(16)

No. 95-124-CFX
Status: GRANTED

Title: Denver Area Educational Telecommunications Consortium, Inc., et al., Petitioners
v.
Federal Communications Commission, et al.

Docketed:
July 21, 1995

Court: United States Court of Appeals for the District of Columbia Circuit

Vide:
95-227

Counsel for petitioner: Sims,Charles S.

Counsel for respondent: Solicitor General, Greenberger,I. Michael, Perry,Robert T., Brenner,Daniel T.

Entry	Date	Note	Proceedings and Orders
1	Jul 21 1995	G	Petition for writ of certiorari filed.
3	Aug 15 1995		Order extending time to file response to petition until September 20, 1995.
4	Sep 19 1995		Order further extending time to file response to petition until October 10, 1995.
5	Oct 10 1995		Brief of respondents Federal Communications Commission, et al. in opposition filed. VIDED.
6	Oct 19 1995		Reply brief of petitioners filed.
7	Oct 25 1995		DISTRIBUTED. November 9, 1995 (Page 1)
8	Nov 13 1995		Petition GRANTED.
			**********
9	Dec 14 1995		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 21, 1996. (1ST CASE
10	Dec 20 1995		Joint appendix filed. VIDED.
11	Dec 26 1995		Brief of petitioners Denver Area Educational Telecommunications Consortium, et al filed.
14	Dec 27 1995		Brief amici curiae of American Booksellers Foundation for Free Expression, et al. filed. VIDED.
12	Dec 28 1995		CIRCULATED.
15	Dec 28 1995	X	Brief amicus curiae of Association of American Publishers, Inc. filed. VIDED.
16	Jan 10 1996	D	Motion of petitioners for divided argument filed.
17	Jan 22 1996		Motion of petitioners for divided argument DENIED.
24	Jan 25 1996	X	Brief amicus curiae of Morality in Media, Inc. filed. VIDED.
18	Jan 29 1996	X	Brief of the Federal Respondents filed. VIDED.
19	Jan 29 1996	X	Brief amicus curiae of Time Warner Cable filed. VIDED.
20	Jan 29 1996	X	Brief amicus curiae of Family Life Project of American Center for Law and Justice filed.
21	Jan 29 1996	X	Brief amicus curiae of New York filed. VIDED.
22	Jan 29 1996	X	Brief amicus curiae of National Family Legal Foundation filed. VIDED.
23	Jan 29 1996		LODGING consisting of one video cassette by Dimension Cable Co., Channel 22, Phoenix, AZ 7/30/94, Ms. Nude America, submitted by counsel for amicus, Natl. Family Legal Foundation.
25	Feb 6 1996	D	Motion of Time Warner Cable for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Feb 7 1996		Opposition of the Solicitor General to motion of Time Warner Cable for leave to participate in oral argum filed.
27	Feb 8 1996	X	Supplemental brief of respondents filed. VIDED.

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No. 95-124-CFX

Entry	Date	Note	Proceedings and Orders
28	Feb 13 1996		Motion of Time Warner Cable for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
30	Feb 13 1996	X	Reply brief of petitioners Denver Area Educational Telecommunications Consortium, et al filed.
29	Feb 14 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit (BOX).
31	Feb 21 1996		ARGUED.

FILED

No. ____ 95 124 JUL 21 1995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Sections 10(a) and (b) of the 1992 Cable Act establish a comprehensive scheme for censorship of "indecent programming" on leased access channels. Congress authorized cable operators to prohibit programming that they "reasonably believe" to be indecent and, in the alternative, required such protected speech to be placed on segregated channels that must be blocked until the subscriber requests access in writing and for up to thirty days thereafter. Section 10(c) authorized cable operators to prohibit programming on public, educational, and governmental access channels that is "sexually explicit" or "solicits or promotes unlawful conduct."

1. Is section 10 unconstitutionally vague under the heightened scrutiny required in First Amendment cases, where it (A) defines "indecent programming" based upon its "patently offensive manner as measured by contemporary community standards," (B) authorizes cable operators to ban leased access programming that they "reasonably believe" to be indecent, and (C) will produce self-censorship by access programmers by requiring them — on pain of fines or cut-off of access — to guess what the FCC may decide is, and what a cable operator may "reasonably believe" to be, "indecent," and to certify that their programs do not violate these standards?

2. Is section 10's explicitly content- and speaker-based censorship scheme immune from First Amendment scrutiny as not "state action" because it delegates censorship decisions in part to cable operators, where (A) petitioners challenge a congressional statute, not a cable operator's specific censorship decisions, (B) Congress and the FCC have defined the category of disfavored speech that they wish cable operators to censor, and (C) Congress has created a joint enterprise with cable operators to effect its censorship scheme, in which the FCC is integrally involved?

3. Can section 10(b) be upheld as the least restrictive means of achieving a "compelling" interest in shielding minors from "indecent" speech, where (A) the interest underlying section 10 is already well-advanced by existing, less-restrictive regulation and additional less restrictive means exist and (B) cable operators are free to continue showing on commercial channels the same programs they must now block on leased access channels, thereby demonstrating that section 10 is unjustifiably underinclusive?

LIST OF PARTIES

The judgment here sought to be reviewed was rendered in a proceeding in which four petitions for review of orders of the Federal Communications Commission were consolidated: actions nos. 93-1169, 93-1171, 93-1270, and 93-1276. Petitioner Denver Area Educational Telecommunications Consortium, Inc. was a petitioner in action no. 93-1171, and petitioner American Civil Liberties Union was a petitioner in actions nos. 93-1171 and 93-1276.*

In addition to those listed on the cover, respondents include Alliance for Community Media, Alliance for Communication Democracy, and People for the American Way, which were petitioners in actions nos. 93-1169 and 93-1270, and New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, David Channon, and National Cable Television Association, Inc., which were intervenors in all four actions.

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* Petitioners have no parent companies or subsidiaries.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully petition this Court to issue a writ of certiorari to review the June 6, 1995 judgment of the United States Court of Appeals for the District of Columbia Circuit sitting in banc, sustaining section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j), and 558), and the Federal Communication Commission's implementing regulations.

OPINIONS BELOW

The in banc opinion of the United States Court of Appeals for the District of Columbia Circuit is not yet published and is reprinted in the appendix below ("Pet. App.") at 2a.[1] The in banc *per curiam* order vacating the panel decision is reported at

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[1] "_a" refers to the Appendix to this Petition below.

15 F.3d 186 and reprinted below at 89a. The panel decision is reported at 10 F.3d 812 and reprinted below at 90a.

JURISDICTION

The court of appeals issued its decision on June 6, 1995. The court then granted a motion to stay the issuance of the mandate, which stay is effective until August 9, 1995 and thereafter if a petition for writ of certiorari is filed by that date. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." The Fifth Amendment to the Constitution to the United States provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j), and 558) ("section 10") is reproduced below at 126a.

The implementing regulations of the Federal Communications Commission ("FCC") are the First Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, FCC 93-72, 8 FCC Rcd 998 (1993) (summary of report and reprint of order at 58 Fed. Reg. 7990 (1993)) (codified at 47 C.F.R. § 76.701) ("First Report and Order"), which is reproduced below at 128a, and the Second Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, FCC 93-164, 8 FCC Rcd 2638 (1993) (summary of report and reprint of order at 58 Fed. Reg. 19,623 (1993)) (codified at 47 C.F.R. § 76.702) ("Second Report and Order"), which is reproduced below at 178a.

STATEMENT OF THE CASE

1. Seeking, in part, to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public," 47 U.S.C. § 521, Congress passed the Cable Communication Policy Act of 1984, which required cable operators to set aside channels for leased access programming that the operators were forbidden to censor, *id.* § 532(b), (c)(2), and prohibited them from censoring programming on the public, educational, and governmental ("PEG") access channels that are required under most cable franchises, *id.* § 531(e). Because cable operators were barred from exercising editorial control over these access channels, which the FCC has held to be a "public forum,"[2] Congress shielded cable operators from liability for access programming. *Id.* § 558. In another provision of the Act, Congress required cable operators to provide "lockboxes" that enable a subscriber to block any cable channel during selected periods, *id.* § 544(d)(2); this provision remains in effect.

In 1992, Congress again focused on the cable industry — this time primarily to re-regulate rates, address customer service practices, and implement "must-carry" broadcast rules — and enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. On the last legislative day before the Senate approved its bill, Senator Helms offered two floor amendments and then-Senator Fowler offered a third that collectively became section 10, which is entitled "Children's Protection from Indecent Programming on Leased Access Channels." Senator Helms plainly stated the purpose of section 10's liability provision: to "put an end to the kind of things going on" on access channels. 138 CONG. REC. S652 (daily ed. Jan. 30, 1992). No other provision in either of the lengthy Senate or House bills even remotely treated the subject matter of, or resembled, section 10, which was never sent

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[2] 87 F.C.C.2d 40, 42 (1981).

to a committee and was never the subject of any congressional findings.

Section 10 established a censorship scheme with four interlocking parts. Section 10(a) authorized cable operators to ban from leased access channels what they "reasonably believe[ ] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards"; cable operators were given, and have, no other authority to regulate the content of congressionally mandated leased access programming. Pet. App. 126a.

Section 10(b), the stated purpose of which is "to limit the access of children to indecent programming," required the FCC to prescribe rules requiring cable operators that have not "voluntarily prohibited" programming under section 10(a) to segregate all "indecent" leased access programming on blocked channels that must remain blocked until a subscriber requests access in writing; Congress mandated no time period within which such requests must be satisfied. Pet. App. 126a-27a. Section 10(b) also required the FCC to prescribe rules requiring leased access programmers to inform cable operators whether any of their programming is "indecent." Thus, if programmers do not so certify, they are in effect promising that all of their works are "decent."

Section 10(c) applies to PEG access channels and authorized cable operators to ban "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Pet. App. 127a.

Finally, section 10(d) pressures cable operators to censor "indecency" by eliminating their statutory immunity from liability for programming on access channels that "involves obscene material." Pet. App. 127a.

2. On November 10, 1992, the FCC issued a notice of proposed rulemaking to implement section 10 and requested comments. Petitioners Denver Area Educational Telecommunications Consortium, Inc. ("DAETC"), which is a nonprofit cable

programmer operating a leased access cable service, and American Civil Liberties Union ("ACLU"), whose members include leased and PEG access viewers, (also collectively "Petitioners") submitted comments to the FCC expressing their concerns about the constitutionality of section 10 and its impact on cable system carriage of a wide variety of access programming, much of which has serious journalistic or artistic value.

Petitioners' concerns stem, in large part, from section 10's capacious definition of "indecent programming" as "describ[ing] or depict[ing] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pet. App. 126a. Because this definition has no substantive content except to subject any programming containing any mention of human reproduction or sexuality, regardless of its value, to a retrospective assessment of "community standards" of "offensiveness," it encompasses a far wider range of programming — but how much more is uncertain — than Senator Helms evidently envisioned from the examples he gave on the Senate floor.[3]

For instance, DAETC's cable access service, known as "The 90's Channel," offers in a verité style a wide variety of material, often controversial and otherwise unavailable, on topics including the Persian Gulf war, environmental contamination, AIDS, racism, US-Cuba relations, art censorship, union organizing, the status of recent immigrants, gay rights, the Palestinian uprising, issues of concern to Native Americans, prostitution, and prison conditions. *See* Comments of DAETC on Notice of Proposed Rule Making, Joint Appendix to the Panel of the Court of

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[3] Senator Helms referenced programming on leased access that purportedly featured people performing oral sex and included ads that "promote incest, beastiality [sic], [and] even rape." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992).

Appeals at 207-08. An important part of DAETC's programming on many of these topics inextricably deals with sexuality, such as the program segments about an organization that seeks to demystify gynecology and teach women how to perform their own pelvic exams, the controversy surrounding a Robert Mapplethorpe art exhibit, a pro-choice performance artist, and an annual Japanese fertility festival — all of which might well fall within section 10's broad regulatory definition of "indecency." *Id.* at 219; *see* Pet. App. 44a-45a (Wald, J., dissenting).

3. On February 3, 1993, the FCC released its First Report and Order, which adopted regulations to implement sections 10(a) and (b) relating to leased access channels. Despite Petitioners' and other comments, the FCC defined "indecent" programming almost identically to the language used in section 10(a), authorized a cable operator to adopt and enforce a policy of banning leased access programming that it "reasonably believes" describes or depicts indecency, and, if a cable operator does not voluntarily adopt and enforce such a policy, required it to block all leased access programming that falls within the FCC's definition of "indecent programming." Pet. App. 171a-72a. The regulations further provide that a cable operator may delay for up to thirty days satisfying a subscriber's request to receive the blocked programming and that the subscriber's request must be made in writing. Pet. App. 171a.

The First Report and Order also required leased access programmers to identify whether any of their programming is indecent and to certify at the operator's request whether their programming is indecent or obscene. If a programmer fails to provide this identification or certification in a timely fashion or if a cable operator believes a programmer has certified incorrectly, the cable operator is not required to provide any access at all to that programmer. Pet. App. 171a-72a. Disputes brought by a cable operator over programming that it "reasonably believes" to be indecent but which the programmer did not identify as "indecent" are to be resolved by the FCC; consumer complaints about "indecency" — but not about censorship — on

leased access channels shall also be resolved by the agency. Pet. App. 166a-68a.

On April 2, 1993, the FCC released its Second Report and Order, which adopted regulations to implement section 10(c) relating to PEG access channels. In the Second Report and Order, the FCC interpreted section 10(c) to authorize cable operators to prohibit obscene material, indecent material (defined as in the First Report and Order, rather than as section 10(c)'s "sexually explicit material"), and material soliciting or promoting unlawful conduct (interpreted by the FCC as "material that is otherwise proscribed by law"). Pet. App. 197a-98a. To further facilitate censorship of access programming by cable operators, the FCC added a provision that allows a cable operator to require a PEG access programmer "to certify that its programming does not contain any of the materials" subject to prohibition under section 10(c). Pet. App. 198a.

4. Petitioners directly petitioned the Court of Appeals for the District of Columbia Circuit for review of the First Report and Order pursuant to 28 U.S.C. § 2342(1), and petitioner ACLU petitioned the court of appeals for review of the Second Report and Order. These petitions were consolidated with two others also seeking review of these FCC regulations and challenging the constitutionality of section 10. The FCC and the United States (collectively the "government") were the respondents in all four actions.

On November 23, 1993 — after oral argument during which the government conceded that, if sections 10(a) and (c) involved "state action," they would be constitutionally invalid under the First Amendment, Pet. App. 104a n.9 — a panel of the court of appeals unanimously held that sections 10(a) and (c) violate the Freedom of Speech Clause of the First Amendment. The panel found that sections 10(a) and (c) amply involve governmental action for purposes of the First and Fifth Amendments because of their content-based regulatory objective, their significant encouragement of private censorship, and their inevitable censorship effect. Pet. App. 104a-08a. The panel then held the

FCC's content-based regulations unconstitutional because they are not the least restrictive means of furthering an asserted compelling interest. Pet. App. 109a-11a. As to section 10(b) and the FCC's regulations, the panel found that they posed such serious constitutional questions due to their apparent underinclusiveness that on remand the FCC ought to reconsider them in light of the panel's opinion. Pet. App. 112a-25a.

The full court vacated the panel's judgment, reheard the case in banc, and on June 6, 1995 sustained section 10 and the FCC's regulations over the dissent in whole or in part of four of the full court's eleven judges. Pet. App. 4a-5a.[4]

Writing for the majority, Judge Randolph concluded — in an unprecedented holding — that portions of a content-based statute regulating speech and the agency's implementing regulations are not subject to First Amendment scrutiny because they only authorize, rather than command, private parties to ban a governmentally defined category of protected speech and do not significantly encourage cable operators to do so. Pet. App. 11a-27a. As to section 10(b), which compels blocking in the absence of banning on leased access channels, the majority found — despite the absence of any legislative record — that it was the least restrictive means to serve the government's "compelling" interest in shielding minors from "indecent" speech. Pet. App. 32a-36a. Additionally, the majority found that section 10(b) does not impermissibly discriminate against leased access speakers and listeners (even though it leaves cable operators free to show on other channels programming that they must block on leased access channels), does not entail a prior restraint due to the thirty day waiting period for unblocking (even though viewers will, as a practical matter, be denied access to programs of protected speech that they request), and is not impermissibly vague. Pet. App. 36a-43a.

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[4] Former-Chief Judge Mikva sat on the original panel, but retired before the rehearing in banc.

In her dissenting opinion joined in full by Judge Tatel, Judge Wald pointed out that sections 10(a) and (b) must be considered together as part of one scheme regulating leased access programming, which, rather than "restore" editorial control to cable operators, requires them either to ban or block "indecent programming," and as such are clearly subject to First Amendment scrutiny. Pet. App. 46a-53a. Moreover, Judge Wald explained that, contrary to the majority's view, this is not a case about whether cable operators should be regarded as state actors when they censor indecent speech under section 10; rather, this case challenges the statute and implementing regulations themselves. Pet. App. 50a & n.4 (noting that the majority's finding that cable operators' acts of censorship under section 10 are not reviewable as state action does not thereby make section 10 itself immune from constitutional scrutiny).

Judge Wald, now also joined by Judge Rogers, then concluded that sections 10(a) and (b) unconstitutionally cause a deprivation of First Amendment rights because of their undue burden on both speakers and listeners, Pet. App. 54a-58a, and are not the least restrictive means of achieving the asserted compelling interest because of the ready availability of less restrictive means, such as the existing lockbox requirement, Pet. App. 66a-71a. Additionally, Judge Wald found that section 10(c), with its governmentally imposed definitions of "indecency" and "material soliciting or promoting unlawful conduct," clearly constitutes governmental action and is not the least restrictive means of achieving the asserted compelling interest. Pet. App. 71a-75a.

Chief Judge Edwards dissented in part and found that sections 10(a) and (b), which must be read together, involve government action (while section 10(c) does not) and that they work in tandem to produce an impermissible ban on protected speech. Pet. App. 77a-81a. Chief Judge Edwards also questioned whether the government's asserted interest of shielding minors from "indecency" was compelling. Pet. App. 82a-84a.

Judge Rogers, concurring in part and dissenting in part, agreed with Judges Wald and Tatel that section 10(b) is unconstitutional,

but argued that it is severable from sections 10(a) and (c), which she, like the majority, perceived as merely "restoring" editorial control to cable operators, even though access channels are governmental creations over which cable operators never had any such control. Pet. App. 85a-88a.

REASONS FOR GRANTING THE WRIT

The petition should be granted because of the importance of the issues raised in this case and because of the court of appeals' unprecedented treatment of these issues. This case challenges the constitutionality of an integrated censorship scheme aimed at a content-based and speaker-based category of protected speech, devised by Congress, implemented by the FCC, and carried out in part with the assistance of private parties.

Despite the egregiousness of this censorship scheme, the majority brushed aside consideration of the scheme's vagueness and lack of essential procedural safeguards, inexplicably found federal statutory provisions that target speech on the basis of content not subject to constitutional scrutiny, and held that segregation and automatic blocking of the censored speech is the least restrictive means of achieving a compelling government interest without any supporting congressional findings whatsoever and in spite of extensive congressional findings that this governmental interest is already well-advanced by existing less-restrictive federal regulation.

In reaching these conclusions in its bid to sustain section 10's censorship scheme, the majority's decision conflicts with applicable decisions of this Court concerning vagueness of statutes regulating speech, *e.g.*, *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the due process requirements of statutes banning speech, *e.g.*, *Freedman v. Maryland*, 380 U.S. 51 (1965), the constitutional scrutiny of state action, *e.g.*, *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956) and *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), and the strict requirements of content- and speaker-based statutes

seeking to ban speech, *e.g.*, *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115 (1989).

The decision below also conflicts with decisions of other courts of appeals concerning the heightened vagueness scrutiny afforded statutes regulating speech and directly conflicts with *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994), which is a well-reasoned district court decision finding section 10's censorship scheme unconstitutional.[5]

Finally, with the large and growing number of cable systems across the nation, this case has added significance because of the real risk that self-censorship by programmers and censorship by cable operators will go unreviewed if the decision below is not reversed and the stay that is now in effect is allowed to expire.

I.

WHETHER SECTION 10 IS UNCONSTITUTIONALLY VAGUE UNDER THE HEIGHTENED SCRUTINY REQUIRED FOR STATUTES DIRECTED AT SPEECH AND LACKS ESSENTIAL PROCEDURAL SAFEGUARDS ARE IMPORTANT ISSUES OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE COURT.

The Due Process Clause of the Fifth Amendment requires that statutes and regulations not be so vague that affected parties are uncertain as to what actions are proscribed and that government officials have unbridled discretion in their enforcement decisions. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). This constitutional condemnation of vague laws applies with

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[5] Such a direct conflict between a court of appeals decision and a well-reasoned district court decision has served as the basis for the grant of a writ of certiorari. *Massachusetts v. United States*, 435 U.S. 444, 453 (1978); *see also Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477 n.3 (1981); *Heffron v. International Soc'y for Krisha Consciousness*, 452 U.S. 640, 646 n.9 (1981); *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964).

special force when First Amendment rights are at stake. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Moreover, statutes banning certain speech must include sufficient procedural safeguards "to obviate the dangers of a censorship program." *Freedman v. Maryland*, 380 U.S. 51, 58 (1965). Section 10 meets none of these standards.

In particular, section 10 is impermissibly vague for at least three distinct reasons:

- The FCC has defined "indecent programming" as programming that "describes or depicts sexual or excretory activities or organs in a *patently offensive* manner as measured by contemporary *community standards*." Pet. App. 172a (emphasis added).
- Congress authorized cable operators to ban from leased access channels programming that they "*reasonably believe[ ]*" is indecent. Pet. App. 126a (emphasis added).
- Congress authorized cable operators to ban from PEG access channels programming that contains "material soliciting or promoting *unlawful conduct*," which the FCC has defined as "material that is *otherwise proscribed* by law." Pet. App. 127a, 198a (emphasis added).

The FCC's reference to "community standards" or what is "patently offensive" is an entirely subjective standard that provides no guidance to programmers — given the penalties for guessing wrong — or check on the whim or caprice of cable operators. The inevitable result of such vague terms is that arbitrary enforcement will be wide-spread: cable operators will censor, and programmers will self-censor, important and valuable programming — such as the offerings of DAETC on arts censorship, safe sex, or gay rights — simply because it may have some sexual content or vulgar words. *See Grayned*, 408 U.S. at 108-09.

Moreover, Congress' use of the phrase "reasonably believes" substantially augments section 10's problems, because what cable

operators "reasonably believe" is indecent is a larger and even vaguer category than what actually is "indecent" (to the extent that term has any meaning), resulting in the ban of non-"indecent" speech and heightened arbitrariness and self-censorship. *See Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 781-82 (C.D. Cal. 1991) (requirement that artists certify that none of their works may be considered obscene in the NEA's judgment is void for vagueness).[6]

Obscenity jurisprudence does not redeem the use of "community standards" in the definition of indecency. Obscenity deals only with "hard-core" pornography, *Miller v. California*, 413 U.S. 15, 27 (1973), which Justice Stewart memorably described with the phrase "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). By contrast, "indecency" encompasses a broad and undefined category that may well extend beyond even "soft-core" pornography and that no member of this Court has ever suggested is recognizable on sight. Additionally, the consideration of "serious value" in obscenity jurisprudence, *i.e.*, literary, artistic, political, and scientific merit, allows speakers to make predictive judgments and courts to develop over time substantive guidance for both speakers and censors. *See id.* at 24. The FCC's "indecency" definition allows for no such safe-predictions or guidance.

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[6] The sum of section 10's chilling effect is exacerbated by the statutory and regulatory certification requirements: the programmer must certify whether any of its programming contains material that is "indecent" under the FCC's definition, is indecent according to the cable operator's "reasonable belief," or is "otherwise proscribed by law." Pet. App. 172a, 198a. As this Court held in *Baggett v. Bullitt*, "[t]he uncertain meanings of . . . oaths require the oath-taker . . . to 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked." 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)) (citation omitted); *see Bella Lewitzky*, 754 F. Supp. at 782-83.

Clearly, the overall result of section 10's multiple vagueness problems is harmful self-censorship by artists and other programmers and unbridled discretion vested in the FCC and its cable operator delegates to censor where programmers do not self-censor. This Court has repeatedly condemned vague laws for precisely these reasons. *E.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757-58 (1988); *Cramp v. Board of Public Instruction*, 368 U.S. 278, 283-84 (1961).

Equally inconsistent with what three decades of First and Fifth Amendment cases have required is the lack of essential procedural safeguards accompanying Congress' joint censorship enterprise with cable operators; safeguards that are mandated "to obviate the dangers of [section 10's] censorship program." *Freedman v. Maryland*, 380 U.S. at 58. Section 10 and the FCC's implementing regulations provide no procedural safeguards whatsoever. *See* Pet. App. 126a-27a, 171a-73a, 197a-98a. Indeed, in the discussion portion of the First Report and Order, the FCC states that it "do[es] not envision disputes arising [under sections 10(a) and (b)] except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent" by the cable operator or a subscriber; in such cases, the FCC states that it will entertain special relief petitions from the cable operator or the complaining subscriber. Pet. App. 167a-68a.

This is not the type of "safeguard" required by the Due Process Clause in the First Amendment censorship context: prior procedural mechanisms to protect the speaker being censored, with, at a minimum, provisions for prompt judicial review initiated by the censor, who must bear the burden of proof. *Freedman v. Maryland*, 380 U.S. at 58-59; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 560 (1975). The FCC's statement (even if it were binding) provides no such *prior* procedural safeguards to protect *programmers* from uncontrolled

censorship; rather, it serves only to give further procedural power to censoring cable operators.[7]

In response to these concerns, the court of appeals held in a one-page discussion that Petitioners' vagueness arguments are foreclosed because the FCC will resolve any conflicts as to what is "indecent" programming, and because prior decisions — *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) ("*ACT I*"), and *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507-08 (D.C. Cir. 1991), *cert. denied*, 503 U.S. 913 (1992) ("*ACT II*") — had decided that any vagueness challenge was foreclosed by *FCC v. Pacifica Communications Comm'n*, 438 U.S. 726 (1978). Pet. App. 42a-43a.[8]

The holding that *Pacifica* disposes of Petitioners' vagueness challenge is in conflict with all the cases cited above at 11-14. *Pacifica* did not overrule the principles approved in those cases and, indeed, did not address the vagueness of the FCC's

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[7] Section 10's vagueness and due process deficiencies are further illustrated by analogy to a series of decisions striking down statutes that delegated governmentally enforceable censorship standards to the private motion picture industry rating system. *National Ass'n of Theatre Owners v. Motion Picture Comm'n*, 328 F. Supp. 6 (E.D. Wis. 1971); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970); *Motion Picture Ass'n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970). These courts consistently held that governmental delegation to private groups of the power to evaluate and label films for purposes of establishing censorship standards enforceable by law violates the most fundamental principles of due process. Here, similarly, the government has defined — albeit vaguely — the content of the material it wishes to see censored, has delegated the application of the standard in the first instance to private parties, and has given them every encouragement to censor; all without any clear boundaries or procedural safeguards.

[8] The court of appeals reached this issue only as to section 10(b), inexplicably concluding that the remainder of the statute was not state action to which constitutional scrutiny applied. *See*, below, point II.

indecency definition. Moreover, it certainly did not deal with a statute involving the added phrase "reasonably believes" or with the delegation to private censors of the duty to decide (with no semblance of due process safeguards) what falls under a governmentally defined standard. As for section 10(c), *Pacifica* would not control even if it had decided the vagueness question, because section 10(c) deals with the distinct — and completely vague — category of material that "solicit[s] or promot[es] unlawful conduct," rewritten by the FCC to mean material "otherwise proscribed by law."

Additionally, the majority did not consider the vagueness of section 10 under the heightened scrutiny required of statutes impacting speech. This refusal conflicts with applicable decisions of other courts of appeals. *E.g.*, *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684, 690 (8th Cir. 1992) (emphasizing the importance of heightened vagueness scrutiny and striking down a statute regulating the sale of "violent" videos); *Shamloo v. Mississippi State Bd.*, 620 F.2d 516, 523-24 (5th Cir. 1980) (applying a heightened scrutiny to a statute's use of the term "wholesome").

The *Pacifica* Court's self-described narrow, plurality, as-applied decision that the FCC's "indecency" definition could be retrospectively applied to seven "dirty" words is not authority for upholding (as the court below did) a delegation to private parties — with their own self-interests at heart — of the power to censor anything that they "reasonably believe" to be indecent.[9]

In short, the court of appeals far too casually swept aside an important issue that merits being settled by the Court.

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[9] Moreover, the court in *ACT I* was notably tentative in describing *Pacifica*'s "implicit" resolution of the vagueness issue and "welcome[d]" correction from "Higher Authority." 852 F.2d at 1339 (Ginsburg, J.). With Congress increasingly considering "indecency" as a censorship standard, it is time for the Court to accept now-Justice Ginsburg's invitation.

II.

WHETHER CONTENT-BASED AND SPEAKER-BASED FEDERAL STATUTORY PROVISIONS AIMED AT SPEECH CAN BE IMMUNE FROM CONSTITUTIONAL SCRUTINY SIMPLY BECAUSE THEY DELEGATE CENSORSHIP DETERMINATIONS IN PART TO PRIVATE PARTIES IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE COURT.

Where Congress seeks to regulate protected speech on the basis of its content or only if uttered by certain speakers, its regulation is subject to strict scrutiny and will be upheld — if at all — only if the government shows that the regulation is narrowly tailored and the least restrictive means of advancing a compelling interest. *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989).

Because it regulates only "indecent programming" on leased and PEG access cable channels, section 10 is both content- and speaker-based. Moreover, section 10's censorship scheme undeniably extends to speech containing significant literary, artistic, political, or scientific value that is fully protected under the First Amendment. *Id.*

The government has conceded that sections 10(a) and (c) would be unconstitutional if strict scrutiny applied and does not contest that section 10(b) is subject to strict scrutiny; propositions that the court of appeals accepted. Pet. App. 11a, 32a; *see id.* 104a n.9. However, focusing incorrectly on future censorship actions of cable operators rather than on section 10 itself, the government argued that any acts of censorship by cable operators are not attributable to the state and, therefore, because the Constitution does not constrain private parties and because sections 10(a) and (c) merely "restore" cable operators' editorial control by giving them authority to ban "indecent programming," sections 10(a) and (c) are not subject to strict scrutiny. The majority agreed with this analysis and conclusion. Pet. App. 22a-23a.

That approach, however, asks the wrong question and supplies the wrong answer. *Cf. Lebron v. National R.R. Passenger Corp., 115 S. Ct. 961, 965 (1995).* As explained by Judge Wald, this is not a case about whether cable operators should be regarded as state actors with respect to particular censorship decisions; rather, this case challenges the statute and implementing regulations themselves, which delegate to cable operators the power to "ban" a category of speech based upon its content; a power that they did not enjoy with respect to access programming prior to section 10's enactment and still do not enjoy as far as any other category of access speech is concerned. Pet. App. 50a & n.4 (Wald, J., dissenting).

The court of appeals' unprecedented holding that sections 10(a) and (c) are not subject to constitutional scrutiny should be reviewed by the Court for two reasons: first, the loophole it creates would allow Congress to regulate free from the confines of the Constitution; second, it derogates from well-established, applicable decisions of this Court making clear that duly enacted legislation is always "state action" that must operate within constitutional bounds.

In section 10, Congress and the FCC defined a category of speech on cable according to its content ("indecent programming"), singled that category out for special adverse treatment (banning, blocking, certification), and limited that treatment to only certain producers of that category of speech (cable access programmers). Further, the FCC has undertaken to resolve certain disputes between and among cable operators, programmers, and subscribers over the proper application of its definition of "indecency." Pet. App. 166a-68a. Notably, as to leased access programming, Congress has required — not just authorized — cable operators to suppress indecent programming: if they do not ban this speech pursuant to section 10(a), they must block it pursuant to section 10(b).

Congress has created this scheme — so precisely targeted to one solitary form of congressionally disfavored speech that it cannot possibly be termed simply the "restoration" of editorial

control — yet the court of appeals held that sections 10(a) and (c) are not subject to First Amendment scrutiny because any resulting censorship is delegated in the first instance to private parties. The court of appeals' rationale is equally applicable to other subjects of regulation, such as those that are otherwise subject to the Equal Protection Clause or the Takings Clause, but which may now avoid such constraints as long as the actual adverse treatment is at all conditional on a private party. Apparently, a statute authorizing private parties to destroy printing presses of publishers of some political stripe, or privileging persons to assault persons of color, would escape constitutional scrutiny under the same reasoning.

The court of appeals' holding is flatly in conflict with all applicable decisions of this Court.[10] First, no statute has ever been held not "state action." As Professor Tribe has noted, "[i]f litigants challenge a federal or state *statute* . . . in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed." Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW § 18-1 at 1688 (2d ed. 1988).

Second, the court of appeals ignored *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), which was brought to the court's attention by Petitioners but not even mentioned in the majority's opinion. As described in *Hanson*, the Railway Labor Act initially prohibited private railroads and unions from entering into privately bargained "union shop agreements," but was later amended to authorize affirmatively such agreements, thereby "restoring" private power. The Court held that, although this revised statutory provision was only permissive and did not

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[10] Additionally, the decision below is directly contrary in findings and result to the well-reasoned decision in *Altmann*, 849 F. Supp. 1335, which considered sections 10(a) and (c) to be state action and struck them down.

compel action, it was nonetheless subject to First Amendment scrutiny because

> the federal statute is the source of the power and authority by which any private rights are lost or sacrificed. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction.

Id. at 231-32 (footnote and citations omitted). The court of appeals' holding is directly contrary to that of the Court in *Hanson*.

Third, sections 10(a) and (b) establish a comprehensive scheme to censor "indecency" on leased access channels with private cable operators and the FCC playing interlocking roles: the FCC defines indecency, resolves certain disputes over its application, and prescribes blocking and segregation requirements, while the cable operators determine what programming falls within their "reasonable belief" of indecency and decide whether to ban or block such programming. Such a joint enterprise between government and private actors is subject to constitutional scrutiny. *See Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).

Similarly, the court of appeals' holding directly contradicts *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 615 (1989), which specifically held that private drug tests permitted but not compelled by statute gave rise to Fourth Amendment scrutiny because, as in the present case, "the Government did more than adopt a passive position towards the underlying conduct." The court of appeals completely ignored this ruling in *Skinner*, as well.[11]

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[11] The in banc majority's opinion also conflicts with a number of this Court's other cases applying the "state action" doctrine — including the (continued...)

III.

WHETHER SECTION 10(B) VIOLATES THE FIRST AMENDMENT AS NOT THE LEAST RESTRICTIVE MEANS TO ACHIEVE A COMPELLING GOVERNMENT INTEREST AND AS UNJUSTIFIABLY UNDERINCLUSIVE IS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE SETTLED BY THE COURT.

A statute or regulation that imposes content-based restrictions on protected speech must be found unconstitutional either if it is unjustifiably underinclusive or not narrowly drawn and carefully tailored or if the government fails to prove that it is the least restrictive means of achieving a compelling governmental interest. *Sable*, 492 U.S. at 126.[12]

Section 10(b) requires cable operators to block all speech on leased access channels that programmers have identified as falling within the definition of "indecent programming," and which cable operators have not outright banned under section 10(a) (or which programmers have not already self-censored). As such, it is a

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[11](...continued)
"significant encouragement" test of *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982), and the warning in *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (Burger, C.J.), that "'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'" — as well as with this Court's jurisprudence on the regulation of speech in "public fora," which Congress, the FCC, and the courts have repeatedly characterized access cable channels as being.

[12] As noted by Chief Judge Edwards in disagreement with the majority, speech on cable is not subject to the lesser First Amendment scrutiny sometimes afforded broadcast speech. Pet. App. 81a-82a (Edwards, C.J., dissenting) (citing *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994)).

content-based restriction on protected speech subject to the underinclusiveness and strict-scrutiny tests.[13]

Section 10(b) is unjustifiably underinclusive because it only blocks "indecent programming" on leased access cable channels, without also regulating "indecent programming" on commercial cable channels. This results in allowing cable operators to cablecast on their own unblocked commercial channels their own "indecent programming" (that would be subject to blocking if it were designated for leased access channels) and even the very same "indecent programming" that they banned or blocked from the regular leased access channels.

In other similar situations, this Court has held such underinclusive, speaker-based discrimination unconstitutional because it did not substantially advance the government's asserted interest or because the statutory distinctions were not justified by necessity. *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (statute prohibiting publication of rape victim's name only applied to instruments of mass communication); *FCC v. League of Women Voters*, 468 U.S. 364 (1984) (statute prohibiting speech by noncommercial educational broadcasting stations only applied to "editorializing"); *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978) (statute prohibiting corporations from paying for publicizing opinions only applied to banks and their views on a state income tax amendment).

Nonetheless, on this important issue, the court of appeals ruled that section 10(b) is not underinclusive — relying on the "Congress may take one step at a time" approach that this Court has consistently held not applicable in the First Amendment realm — and did not require the distinction made by the statute to be

[13] The government conceded that, if its state action argument were not accepted, sections 10(a) and (c) should be found unconstitutional. Pet. App. 104a n.9. Even had it not so conceded, these sections are clearly unconstitutional because they effect a total ban on speech, which is even further from being the least restrictive means than is section 10(b). *Sable*, 492 U.S. at 127.

justified as necessary. *Compare* Pet. App. 39a-40a *with Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987) (interest in taxation does not justify content-based differential incidence of tax); *Carey v. Brown*, 447 U.S. 455, 465 (1980) (interest in lowering noise level did not justify differential treatment of labor picketing from non-labor picketing).

Additionally, the government has not borne its burden of proving that section 10(b) is the least restrictive means to achieve any compelling governmental interest.[14] Since 1984, Congress has mandated that cable operators provide a "lockbox" to every subscriber, 47 U.S.C. § 544(d)(2), having found during lengthy committee hearings and floor discussions that lockboxes are a very effective and efficient means of individually regulating what is viewable in one's own home, *e.g.*, H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984).[15] There is no demonstration in section 10's legislative history — indeed, there are no congressional findings as to section 10 at all — that lockboxes are no longer a sufficient means of meeting any asserted compelling governmental interest underlying section 10 or otherwise.

Moreover, section 10(b) requires subscribers who want to continue to have access to this category of governmentally

[14] Even assuming that the government's asserted interest behind section 10 is "compelling," an issue on which Chief Judge Edwards has expressed doubts which Petitioners share, *see* Pet. App. 82a-84a (Edwards, C.J., dissenting), there was certainly no showing demonstrated in the congressional findings of harm to minors from possible exposure to a vaguely defined category of "indecent" speech.

[15] Lockboxes allow a subscriber to block and unblock any channel at any time, generally by programming their lockbox and using a numerical code or mechanical lock that the subscriber controls. Pet. App. 36a. By contrast, the segregation and blocking requirement of section 10(b) forces the targeted speech to be placed on a separate channel that is automatically blocked by the cable operator; a subscriber may view programming on that channel only if a request is made in writing and only after the operator complies with that request, for which it has thirty days.

targeted and disfavored speech to so request affirmatively and in writing. Even assuming that it is necessary or appropriate to segregate some, but not all, "indecent" programming on a specific channel, the burden should be on those who want to block access to constitutionally protected speech, rather than on those who seek access to it.[16] *Cf. Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965) (public "is likely to feel some inhibition in sending for literature which federal officials have condemned"). In any event, the First Amendment cannot tolerate making subscribers wait for up to thirty days for unblocking, by which time any programs that led to the unblocking request will have been missed.

Nonetheless, with little analysis and complete silence on the First Amendment rights of adults and older minors, the court of appeals held that section 10(b)'s total blocking of "indecent programming" on leased access channels was the least restrictive means of achieving the asserted "compelling" interest. Pet. App. 36a.

Section 10(b)'s constitutionality under the First Amendment is an important issue that the Court should settle, made even more so by the court of appeals' disregard for applicable decisions of the Court.

[16] This could be easily accomplished by requiring cable operators to notify subscribers (by flier accompanying the monthly bill or by statements between programming) that segregated channels carrying "indecent" programming can be either entirely blocked by the cable operator until otherwise requested or blocked on a program by program basis by the subscriber using the lockbox.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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New York, New York
July 18, 1995

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 93-1169 **September Term, 1994**

Alliance for Community Media, et al.,
Petitioners

v.

Federal Communications Commission
and United States of America,
Respondents

and consolidated cases

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Upon consideration of the Motion to Stay Issuance of In Banc Court's Mandate pending the filing of a Petition for Writ of Certiorari in the United States Supreme Court, it is

ORDERED, by the Court in banc, that the motion is granted and the Clerk is directed to withhold issuance of the court's mandate for a period of thirty days from the date of this order.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Filed July 10, 1995

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued *In Banc* October 19, 1994 Decided June 6, 1995

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1171

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC.;
AMERICAN CIVIL LIBERTIES UNION,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1270

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1276

AMERICAN CIVIL LIBERTIES UNION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

Petitions for Review of Orders of the
Federal Communications Commission

I. Michael Greenberger argued the cause for petitioners. With him on the briefs were *Charles S. Sims, Lisolette E. Mitz, Marjorie Heins* and *Arthur B. Spitzer* for petitioners Denver Area Educational Telecommunications Consortium, Inc. and the American Civil Liberties Union, *David A. Bono, Michael K. Isenman* and *David B. Goodhand* for petitioners the Alliance for Community Media, the Alliance for Communications Democracy, and People for the American Way, *James N. Horwood* for petitioners the Alliance for Community Media and the Alliance for Communications Democracy, *Andrew J. Schwartzman* and *Elliot Mincberg* for petitioner People for the American Way.

Jacob M. Lewis, Attorney, Department of Justice, argued the cause for respondents. With him on the brief were *Frank W. Hunger*, Assistant Attorney General, and *Barbara L. Herwig*, Attorney, Department of Justice, *William E. Kennard*, General Counsel, *Christopher J. Wright*, Deputy General Counsel, *Daniel M. Armstrong*, Associate General Counsel, and *Gregory M. Christopher*, Counsel, Federal Communications Commission.

Robert T. Perry was on the brief for intervenors New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, and David Channon. *Daniel L. Brenner, Neal M. Goldberg* and *Diane B. Burstein* were on the brief for intervenor National Cable Television Association, Inc. *H. Robert Showers* was on the joint brief for *amici curiae* National Law Center for Children and Families. With him on the joint brief were *James P. Mueller* for National Family Legal Foundation and *Paul McGeady* for Morality in Media, Inc.

Before: EDWARDS, *Chief Judge*, WALD, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, and TATEL, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

Dissenting opinion filed by *Circuit Judge* WALD, in which *Circuit Judge* TATEL joins and *Circuit Judge* ROGERS joins as to Parts II and III.

Opinion dissenting in part filed by *Chief Judge* EDWARDS.

Opinion concurring in part and dissenting in part filed by *Circuit Judge* ROGERS.

RANDOLPH, *Circuit Judge*: This case is here on petitions for review of two orders of the Federal Communications Commission implementing section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j), & 558). Petitioners are five organizations, some of whose members produce programming for cable "access" channels; an individual "access" programmer; and two other groups whose members watch cable television. The case was argued first to a panel of the court, which remanded it to the Commission on the grounds that sections 10(a) and 10(c) violated the freedom of speech clause of the First Amendment to the Constitution and that section 10(b), and the Commission's regulations thereunder, posed such serious constitutional questions that the Commission ought to reconsider the matter in light of the unconstitutionality of sections 10(a) and 10(c). *Alliance for Community Media v. FCC*, 10 F.3d 812, 823-24, 829 (D.C. Cir.1993). The full court vacated the panel's judgment. *Alliance for Community Media v. FCC*, 15 F.3d 186 (D.C. Cir.1994). On rehearing the case *in banc*, we sustain section 10 and the Commission's regulations.

I

The Commission gradually began asserting jurisdiction over a form of cable television — community antenna television systems — in the early 1960's. Through that decade and into the next, the pace of regulation intensified. By 1980, however, the trend had reversed itself. The cable industry experienced substantial federal deregulation, driven in no small measure by the Supreme Court's decision in *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979). The Court there struck down, as beyond the Commission's statutory authority over broadcasting, its 1972 rules (as modified by its 1976 rules) requiring cable operators to dedicate four of their "channels for public, governmental, educational, and leased access." *Id.* at 691. Cable operators "own the physical cable network and transmit

the cable signal to the viewer." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2452 (1994). By "transferr[ing] control of the content of access cable channels from cable operators to members of the public," the Commission had — the Court held in *Midwest Video* — transformed cable operators into "common carriers." 440 U.S. at 700, 701. Congress had prohibited the Commission from imposing common-carrier obligations on broadcasters because this would intrude on their editorial control over programming. *Id.* at 705. Cable operators were situated similarly. They shared "with broadcasters a significant amount of editorial discretion regarding what their programming will include," and, like broadcasters, could not be burdened with common carrier obligations without Congress' express direction. *Id.* at 707, 709.

The Cable Communications Policy Act of 1984 revived much of the agency-created system struck down five years earlier in *Midwest Video*. The 1984 Act compelled cable operators of systems with more than thirty-six channels to set aside between 10 and 15 percent of their channels for commercial use by persons unaffiliated with the operator. 47 U.S.C. § 532(b). On these "leased access" channels, the statute forbade the operator from exercising "any editorial control over" the programming, "except that an operator may consider such content to the minimum extent necessary to establish a reasonable price" for the use of the channel. 47 U.S.C. § 532(c)(2). In return, the 1984 Act exempted operators from criminal and civil liability arising from programs carried on leased access channels. 47 U.S.C. § 558 (amended 1992). While thus removing the operators' control over and legal responsibility for leased access programming, the 1984 Act empowered local franchising authorities to bar or regulate such programming if, in the authority's judgment, it "is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States." 47 U.S.C. § 532(h).

The 1984 Act also authorized local franchising authorities to require, as a condition for a franchise or for the renewal of one, that operators set aside "channel capacity" for "public, educational, or governmental use." 47 U.S.C. § 531. Subject to section

544(d), cable operators were forbidden from exercising any editorial control over programming shown on these "PEG access" channels. 47 U.S.C. § 531(e) (amended 1992). Section 544(d)(1) permitted cable operators and franchise authorities to specify that cable services would not be provided if they are "obscene or are otherwise unprotected by the Constitution." As with leased access, section 558 of the 1984 Act relieved cable operators from criminal and civil liability for programs carried on PEG channels.

In "order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber," section 544(d)(2) required cable operators to provide equipment — commonly known as a "lockbox" — enabling the subscriber to block a channel during particular periods. 47 U.S.C. § 544(d).

In 1992, for reasons we describe below, *see infra* pp. 19-20, Congress decided that revisions were needed in the 1984 Act's treatment of leased access and PEG access channels. Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, which is set forth in the margin,[1] altered the existing system

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[1] Sec. 10. Children's Protection From Indecent Programming on Leased Access Channels

(a) Authority to Enforce. — Section 612(h) of the Communications Act of 1934 (47 U.S.C. 532(h)) is amended —

(1) by inserting "or the cable operator" after "franchising authority"; and

(2) by adding at the end thereof the following: "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.".

(b) Commission Regulations. — Section 612 of the Communications Act of 1934 (47 U.S.C. 532) is amended by inserting after subsection (i) (as added by section 9(c) of this Act) the following

(continued...)

in several ways. Section 10(a) permitted a cable operator to refuse

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[1](...continued)

new subsection:

"(j)(1) Within 120 days following the date of the enactment of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

"(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

"(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

"(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

"(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).".

(c) Prohibits System Use. — Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

(d) Conforming Amendment. — Section 638 of the Communications Act of 1934 (47 U.S.C. 558) is amended by striking the period at the end and inserting the following: "unless the program involves obscene material.".

Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, § 10, 106 Stat. 1460, 1486 (1992) (codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558).

to carry leased access programming the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pub. L. No. 102-385, § 10(a), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(h)). In order "to limit the access of children to indecent programming," section 10(b) directed the Commission to prescribe rules requiring cable operators who choose to carry indecent programming on leased access channels to place such programs on a separate channel and to block the channel until the subscriber, in writing, requests unblocking. *Id.* § 10(b) (to be codified at 47 U.S.C. § 532(j)). Section 10(c) required the Commission to promulgate regulations enabling cable operators to prohibit the use of PEG access channels for "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." *Id.* § 10(c) (to be codified at 47 U.S.C. § 531). Section 10(d) eliminated cable operators' immunity from criminal and civil liability for obscene programming shown on access channels. *Id.* § 10(d) (to be codified at 47 U.S.C. § 558).

In early 1993, the Commission released two Reports and Orders adopting regulations to implement section 10. In the first, the Commission issued regulations implementing sections 10(a) and 10(b), the provisions applying to leased access channels. The Commission defined "indecent" programming in terms nearly identical to those contained in the statute: "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76 701(g)). Leased access programmers were required to inform the cable operator which, if any, of their programs fell into that category. *Id.* (to be codified at 47 C.F.R. § 76.701(d)). Mirroring the statute, the regulations authorized private cable operators to refuse to carry indecent programming on leased access channels; or, if they decided to do so, to segregate that material on a blocked channel. *Id.* (to be codified at 47 C.F.R. § 76.701(a)). A cable

operator must satisfy a subscriber's written request to receive a blocked channel within thirty days. *Id.* (to be codified at 47 C.F.R. § 76.701(c)).[2]

The Commission's second Report and Order contained regulations implementing section 10(c), which applies to PEG access channels. These regulations authorized cable operators to prohibit programming on PEG access channels if it "contains obscene material, indecent material . . . , or material soliciting or promoting unlawful conduct."[3] *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

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[2] With respect to leased access channels, the 1992 Act also directed the Commission to determine the maximum reasonable rates for leased access use, to establish reasonable terms and conditions for such use, including those for billing and collection, and to create procedures for expedited resolution of rate or carriage disputes. Pub. L. No. 102-385, § 9, 106 Stat. 1460, 1484-86 (1992) (codified at 47 U.S.C. § 532(c)(4)(A)(i)-(iii)). The 1984 Act had permitted operators to negotiate with programmers the prices and terms for leased access. DANIEL L. BRENNER, ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.05, at 6-50, 6-57 (1994). For PEG access programming, the 1984 Act authorized local franchising authorities to determine minimum PEG requirements, including allocation of channel capacity to users, availability of equipment and facilities, charges for costs, and requirements that PEG access channels be included in the basic cable tier. Robert F. Copple, *Cable Television and the Allocation of Regulatory Power: A Study of Governmental Demarcation and Roles*, 44 FED. COMM. L.J. 1, 147-48 (1991). The 1992 Act explicitly authorized franchising authorities, when awarding a franchise, to "require adequate assurance that the cable operator will provide adequate public, educational, and governmental access channel capacity, facilities, or financial support." Pub. L. No. 102-385, § 7(b), 106 Stat. 1460, 1483 (1992) (codified at 47 U.S.C. § 541(1)(4)(B)).

[3] The regulations define "material soliciting or promoting unlawful conduct" as "material that is otherwise proscribed by law." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

The regulations permitted cable operators to require PEG access programmers to certify that their programming contains no material in these categories. *Id.*

II

A

Obscenity has no constitutional protection, and the government may ban it outright in certain media, or in all. *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992). But an "indecent" program, as the Commission and the statute define the term, is not necessarily an obscene program.[4] While the government may nevertheless restrict the showing of indecent programs, it may do so only in a manner consistent with the First Amendment. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). If decisions of cable operators not to carry indecent programs on leased or PEG access channels, decisions sections 10(a) and 10(c) permit, were treated as decisions of the government, the Commission and the United States would be hard put to defend the constitutionality of these provisions.

So far as sections 10(a) and 10(c) and the corresponding regulations are concerned, the case therefore turns on the presence

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[4] An indecent program is one that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(g)). As all agree, this definition of indecency does not encompass all of the elements of obscenity. A work is legally obscene, according to *Miller v. California*, 413 U.S. 15, 24 (1973), if (a) "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, . . . ;" (b) "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law;" and (c) "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

or absence of "state action." The First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press" restricts only the government. It does not control private conduct. Before one may determine whether actions taken by cable operators with respect to indecent programming on leased and PEG access channels comport with the First Amendment, one must decide whether those actions may be attributed to the government.

Petitioners initially deny that the case presents any serious state action problem: Congress enacted section 10(a) and section 10(c), and a federal agency issued regulations putting the provisions into effect; these were official actions of the government; hence state action exists. Matters are not quite so simple, however. If the government had commanded a particular result, if it had ordered cable operators to ban all indecent programs on access channels, the operators' compliance would plainly be attributable to the government. *See Action for Children's Television v. FCC*, 932 F.2d 1504, 1508-09 (D.C. Cir.1991), *cert. denied*, 112 S. Ct. 1281 (1992). State action would exist for the same reason that the government's compelling private entities to conduct searches renders the ensuing searches subject to the Fourth Amendment. *See Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). But sections 10(a) and 10(c) do not command. Cable operators may carry indecent programs on their access channels, or they may not. It is true that the Supreme Court has found state action even though legislation, rather than compelling a result, left the matter to the discretion of private actors. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), are such decisions. But neither *Larkin* nor *Loretto* resembles the case before us. State action existed in both of those cases because the government conferred on private parties power that "traditionally [had been] the *exclusive* prerogative" of the government (*San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522, 544 (1987)), in *Larkin* the power to veto liquor licenses, in *Loretto* the power to enter and occupy private property without the owner's consent. By contrast, determining what programs shall be shown

on a cable television system is not traditionally within the exclusive province of government at any level. That section 10 is a federal statute authorizing action by private cable operators is therefore not itself sufficient to trigger the First Amendment. *See Flagg Bros. v. Brooks*, 436 U.S. 149, 165-66 (1978).

The question remains whether section 10 and the regulations establish a "sufficiently close nexus" between the government and cable operators regarding indecent programming on access channels so that state action is present. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); Skinner, 489 U.S. at 615. We agree with petitioners that the question must be answered in view of the precise nature of their objection. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). But what is the nature of their objection? One frame of reference reveals "a battle for supremacy between the asserted rights of private persons." Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 230. That is, petitioners are merely complaining about section 10(a)'s and section 10(c)'s restoring to cable operators' *their* option to reject indecent programming on *their* cable systems. Cable operators "are entitled to the protection of the speech and press provisions of the First Amendment." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. at 2456. When an operator decides what programming will appear on its system, the operator engages in free speech. *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC v. Midwest Video Corp.*, 440 U.S. at 707. It is therefore easy to see how sections 10(a) and 10(c), by giving operators editorial control over indecent programming on their systems' access channels, promote the operators' freedom of speech.[5] Petitioners, on the other hand, do not spell out in their briefs exactly how the same provisions retard their freedom of

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[5] We express no view on whether the provisions of the 1984 and 1992 Acts requiring cable operators to set aside leased access channels and permitting franchising authorities to force operators to set aside PEG access channels infringe upon the First Amendment rights of cable operators or programmers.

speech. We gather from their submissions to the Commission that they have members who wish to watch programs on access channels describing or depicting "sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium"; and that the programmers who count themselves among the petitioners wish to produce this sort of material for television. These interests will be damaged, petitioners told the Commission, because sections 10(a) and 10(c) will reduce the amount of indecent programming on cable access channels. The idea appears to be that if legislation altering the existing state of affairs threatens to lessen the quantity of indecent speech, the government bears the legal responsibility for the private decisions causing that result.

The question naturally arises — less indecent programming as compared to what? The status quo ante? If the state of affairs under the 1984 Act were the baseline from which to measure, as petitioners assume without stating why, their assessment of section 10's impact might be accurate. The 1984 Act did not permit cable operators to decline indecent programming on access channels; after the 1992 amendment, they had that option. But what of the period before 1984? The Supreme Court's 1979 decision in *Midwest Video* relieved cable operators of the obligation, then imposed by regulation, to provide leased access and PEG access channels. Under those early regulations, operators were required — with respect to both types of access channels — to establish rules prohibiting the "presentation of . . . obscene and indecent matter." 47 C.F.R. § 76.256(d)(1)-(2) (1976); *see Midwest Video*, 440 U.S. at 693 n.4. As compared to the situation before the 1979 *Midwest Video* decision, when indecent programming on access channels was entirely forbidden, section 10 of the 1992 Act permits more — not less — such programming. Still another comparison presents itself. Rather than focusing only on the pre-1992 and post-1992 situations with respect to access channels, one might contrast access channels with other cable channels. Cable operators have always had the discretion not to carry indecent programming on their non-access channels. Yet no one would contend that the First Amendment constrained the operator's editorial judgment in this regard. We

therefore cannot agree with the premise implicit in petitioners' arguments — that the 1984 Act gave rise to the constitutionally proper quantity of indecent access programming. The First Amendment did not compel the 1984 Act, and it certainly did not compel prohibiting cable operators from exercising any editorial control over access programming.

This, we believe, places in the proper perspective petitioners' charge that section 10 of the 1992 Act "establishes" a "procedural scheme of private censorship." Brief for Petitioners at 20, 27. If "censorship" is understood as editorial control, petitioners are partly correct, but their description does not translate into state action. The 1984 Act also initiated what may be described as a system of "private censorship." From 1984 until 1992, Congress gave private parties in charge of programming on leased access channels complete control, free from any operators' oversight, regarding what the cable television audience could see on these channels. During that eight-year period, programmers were the ones exercising control over the content of access programming. In petitioners' terms, they were the ones acting as "private censors." When the 1992 Act gave cable operators the option of vetoing decisions of access programmers to televise indecent programs, it simply adjusted editorial authority between two private groups.

As we see it, therefore, petitioners have merely discovered an inherent characteristic of cable systems: the more discretion a cable operator has over what will appear on its system, the less discretion resides in those who have been given access to the operator's system (and vice versa). To suppose that whenever Congress restores to cable operators editorial discretion an earlier statute had removed, the operators' exercise of this discretion becomes state action subject to the First Amendment, not only would disable the legislature from correcting what it perceives as mistakes in legislation, but also would deter it from experimenting with new methods of regulating. No analogous state action decision of the Supreme Court — including *Reitman v. Mulkey*, 387 U.S. 369 (1967), from which the original panel took "specific guidance" and on which it relied almost exclusively for its state action analysis

(*Alliance for Community Media*, 10 F.3d at 818-22) — has ever gone so far.

Reitman may have leapt to mind because it too involved legislation modifying statutory restrictions on private parties. But not much can be made of the case for our purposes, certainly not nearly as much as the original panel made of it. Petitioners seem to share our judgment. *Reitman* is cited but once in their *in banc* briefs, and then only in a footnote to support the notion that it embodies a state action standard no different than *Blum v. Yaretsky*, which we will discuss more fully in a moment. Brief for Petitioners at 32 n.16. *Reitman* began as a suit between private parties, with the plaintiffs claiming they had been denied an apartment on the basis of their race in violation of a state housing law. In 1964, while the suit was pending, California voters approved Proposition 14, a state constitutional amendment (Art. I, § 26) prohibiting the state or any subdivision or agency thereof from denying or limiting the right of any person to sell, lease or rent his real property to any "persons as he, in his absolute discretion, chooses." 387 U.S. at 371. One effect of adding § 26 to the state constitution was to repeal the state law prohibiting private racial discrimination in housing. If this were all § 26 accomplished, the case might have come out differently: "simple repeal or modification of desegregation or antidiscrimination laws, without more, never has been viewed as embodying a presumptively invalid racial classification." *Crawford v. Board of Educ.*, 458 U.S. 527, 539 (1982). But in *Reitman*, Justice White, speaking for four other Justices, demonstrated the fallacy of thinking § 26 had only the effect of repealing antidiscrimination legislation. 387 U.S. at 376. "The section struck more deeply and more widely." *Id.* at 377. "Private discriminations in housing . . . enjoyed a far different status [after enactment of § 26] than was true before passage of [the state] statutes" outlawing private racial discrimination. *Id.* After § 26, minority groups who sought new fair housing laws in California would somehow have to get the state constitution amended before they could even attempt to convince the legislature to enact such laws, while those seeking other legislation could proceed directly to the legislature. By placing this

impediment in the way of new anti-discrimination measures, § 26 itself discriminated against minority groups, and for that reason constituted action of the state forbidden by the Fourteenth Amendment.

This has long been the accepted understanding of *Reitman*. *See, e.g.*, DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT 420 (1990); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1700 (2d ed.1988); Charles L. Black, Jr., *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 75, 82 (1967); Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 247; Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39, 51.[6] So understood, the decision cannot support a finding of state action here.Congress may modify section 10 of the 1992 Act anytime it chooses, just as it modified the related provisions of the 1984 Act.There are no special impediments to its doing so.

Apparently recognizing this, petitioners invoke not *Reitman*, but the statement in *Blum v. Yaretsky*, 457 U.S. at 1004, that "although the factual setting of each case will be significant," the government "normally" can be held accountable for a private decision "only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." The Court followed this qualified declaration with another qualification: "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for

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[6] The panel opinion deemed it "not critical" that "*Reitman* involved an amendment to the state constitution that also banned future enactment of fair housing laws without an additional amendment of the state constitution." *Alliance for Community Media*, 10 F.3d at 820 n.8. The Supreme Court in *Reitman* and in *Crawford*, and each of the authors cited in the text, thought the opposite.

those initiatives under the terms of the Fourteenth Amendment." *Blum*, 457 U.S. at 1004-05.

The "coercive power" element in the *Blum* formulation has no application here for reasons already suggested. Rather than coerce cable operators, section 10 gives them a choice.[7] Section 10(b)'s segregation and blocking requirements apply to "cable operators [who] have not *voluntarily* prohibited" indecent programming on leased access channels.Pub.L. No. 102-385, § 10(b), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(j)(1)) (emphasis added). The Commission too put the matter in those terms. Its first Report and Order states that any prohibition of indecent programming on leased access channels will be "voluntary, not mandatory" and that Congress did not intend cable operators to "act as involuntary government surrogates." First Report and Order, 8 F.C.C.R. 998, 1003 ¶ 30 (1993). Section 10(c) is to the same effect." It instructs the Commission to promulgate regulations *enabling* — not requiring — cable operators to prohibit indecent

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[7] Judge Wald mixes apples and bricks in her four formulations of the combined effect of § 10(a) and § 10(b). Dissent at 5. Take for example, her number 1: "'an operator *must* ban, or in the alternative *must* block'" indecent programming on leased access channels. Operators who block are necessarily operators who have not banned indecent speech. They are carrying such programs on their systems and are leaving to their subscribers the choice of tuning in. Despite all the fancy footwork, the formulations merely report that (1) under these provisions operators now have the editorial discretion to carry or not to carry indecent programming on their leased access channels; and (2) if they opt to carry such programming, they have to comply with § 10(b). To conclude from this that the operators' decisions are state action is the same as saying that if you are deciding whether to enter a particular line of business regulated by the state, your decision whether to enter the business is "state action." You "must" comply with regulations, or you "must" stay out. Or closer to home, Judge Wald would find state action when an Indiana bar decides whether to have nude dancing — in her formulation, the bar either must ban nude dancing or it must block children and others who do not consent to watching the show. *Cf. Barnes v. Glen Theatres, Inc.*, 111 S. Ct. 2456, 2461 (1991).

programming on PEG access channels (Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 531)) and the Commission's implementing regulation provides that cable operators "may" prohibit indecent programming on PEG access channels. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

As to the remaining portion of the *Blum* formula, petitioners offer three ways in which section 10 "has provided such significant encouragement" to cable operators not to carry indecent programming on their PEG and leased access channels that state action must be found. The first borrows from the original panel opinion's assertion "that the immediate objective of the 1992 Act is to suppress indecent material and limit its transmission on access channels" and that "the government wishes to suppress" such material on access channels. *Alliance for Community Media*, 10 F.3d at 820; Brief for Petitioners at 28. There is no doubt that section 10 embodies an objective, but it is one rather different than that described in the passages just quoted. The immediate aim — all that can be discerned from the language of the statute — is to give cable operators the prerogative not to carry indecent programming on their access channels. Experience under the 1984 Act moved Congress to legislate as it did.

"The problem," Senator Helms stated during the floor debate, "is that cable companies are required by law to carry, on leased access channels, any and every program that comes along," including programs that consist of a wide variety of highly indecent material. 138 CONG. REC. S646 (daily ed. Jan. 30, 1992). The Senator described leased access programming in New York City that "depicts men and women stripping completely nude"; another featuring people performing oral sex; a channel with ads promoting "incest, bestiality, [and] even rape"; and a channel in Puerto Rico carrying the Playboy Channel. *Id.* As he also pointed out, leased access channels are "not pay channels, they are often in the basic cable package." *Id.* Senator Thurmond mentioned leased access channels with "numerous sex shows and X-rated previews of hard-core homosexual films," as well as channels with ads for

phone lines letting listeners eavesdrop on acts of incest. *Id.* at 648. PEG channels were also being used, for example, "to basically solicit prostitution through easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone. . . [solicit] illegal activities." *Id.* at 649 (statement of Sen. Fowler); *see also id.* at 650 (statement of Sen. Wirth) (agreeing that public access "clearly . . . has . . . been abused").

Before the Commission, many commenters recognized that indecent programs had been transmitted on cable access channels, both leased and PEG. Time Warner Entertainment informed the Commission that its New York City cable subsidiary carries a leased access program ("Midnight Blue") which "include[s] excerpts from sexually explicit video cassettes and films showing in graphic detail intercourse, masturbation and other sex acts," and which advertises "sex-oriented products and services, such as 'escort services,' 'dial-a-porn' telephone lines and Screw Magazine ('Midnight Blue's' print counterpart)." Comments of Time Warner Entertainment Co., L.P., at 3 (Dec. 7, 1992). The company reported that its leased access channel on which Midnight Blue appears is "usually fully booked with sexually explicit programming" every day "from 10:00 p.m. to 4:30 a.m.," and "the demand for additional time remains high." *Id.* The record before the Commission showed that indecent programming was also a problem on PEG channels. For example, the Commission was informed that programming transmitted over the public access channel serving the City of Tampa, Florida, included "visual depiction[s] of male and female nudity . . . simulated sexual activity, and/or sexually related physical contact between performers and audience members." Comments of City of Tampa, at 2 (Dec. 7, 1992). A Tampa viewer described turning on her local public access channel in prime time and seeing "[t]otally nude women . . . squatting and gyrating so that their genitals were in full view," and "a tape of a totally naked man dancing and screaming obscenities." Comments of Virginia B. Bogue, at 1 (Dec. 4, 1992). And one large cable operator noted that a public access channel on one of its systems transmitted a program "in which an access user,

frontally nude, urinated on a photograph of the President of the United States." Comments of Continental Cablevision, Inc., at 4 n.3 (Dec. 7, 1992).

Congress could consider itself accountable for the appearance of these and other such programs. The 1984 Act made them possible by compelling cable operators to set aside leased access channels and, at the franchising authorities' direction, PEG access channels, and by barring the operators from exercising any editorial judgment over what would be shown there. Whatever may be said in support of indecent programming on access channels,[8] Congress surely does not have to promote it. In dealing with cable television, Congress, no less than states dealing with relations between races, cannot "be committed irrevocably to legislation that has proved unsuccessful or even harmful in practice."[9] *Crawford v. Board of Educ.*, 458 U.S. at 539. Section 10 of the 1992 Act extricated Congress from its promotional role, not by banning indecent programming on access channels, but by permitting cable operators to "police their own systems," which the 1984 Act had prevented them from doing. 138 CONG. REC. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth).

We have no doubt that among the Members of Congress who voted for the 1992 Act there are those who would applaud any

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[8] "[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . . ." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976); *see FCC v. Pacifica Found.*, 438 U.S. 726, 743 (1978).

[9] In light of *Crawford*, 458 U.S. at 538, a State's "mere repeal of race-related legislation or policies that were not required by the Federal Constitution in the first place" does not make private individuals state actors so that their treatment of others on the basis of race is governed by the Fourteenth Amendment. By analogy, the Constitution did not require Congress to bar operators from exercising editorial control over indecent programming on access channels; and, contrary to Judge Wald (Dissent at 7 n.4), when Congress removed the bar in 1992 it did not transform operators into state actors.

cable operator's decision not to carry indecent programming on access channels, or for that matter, on any channel. Even if we equated the view of some Members with the view of a majority, and even if we pretended that their preferences had somehow manifested themselves in statutory language, this still would not be sufficient to transform a particular operator's decision not to carry indecent programs on its access channels into a decision of the United States. "Mere approval of or acquiescence in the initiatives of a private party," *Blum* reminds us, cannot "justify holding the State responsible for those initiatives," 457 U.S. at 1004-05; *see Flagg Bros. v. Brooks*, 436 U.S. at 164.

Nor does state action result simply because legislation "encourages" the private initiative in the sense of making it possible.[10] *Blum* rejected a procedural due process challenge to decisions of state-subsidized private nursing homes, made without a hearing, to downgrade the level of treatment for patients on Medicaid. Federal Medicaid regulations required nursing homes to maintain different treatment levels and to transfer patients whenever necessary; when a nursing home downgraded a patient's treatment, the State reduced the patient's Medicaid payments. 457 U.S. at 994-95. In *Blum*, the "State was indirectly involved in the transfer decisions . . . because a primary goal of the State in regulating nursing homes was to keep costs down by transferring patients from intensive treatment centers to less expensive facilities." *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). "State and federal regulations encouraged the nursing homes to transfer

[10] For instance, it cannot be that because access channels came into existence as a result of governmental action, the private day-to-day decisions — by programmers or by cable operators — about what will be shown on those channels embody state action. The federal government may create corporations but the resulting quangos are not, for that reason alone, to be treated as governmental rather than private actors. *Lebron v. National Railroad Passenger Corp.*, 115 S. Ct. 961, 974-75 (1995); *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 543 n.23; *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121, 1125 (D.C.Cir.1985).

patients to less expensive facilities when appropriate." *Id.* The nursing homes' transfer decisions were nevertheless private decisions, dependent upon the medical judgment of physicians, and thus not governed by the Constitution. *Blum*, 457 U.S. at 1012. So too with section 10 of the 1992 Act, which facilitates cable operators' editorial control over indecent programming, but does not dictate the outcome or the criteria operators may use in exercising their judgment about whether such programming appears on their access channels.[11]

The second way in which section 10 satisfies the *Blum* formulation, according to petitioners, is by creating "financial incentives" for operators not to carry indecent programming. The idea is that rather than incurring the costs associated with section 10(b)'s requirements, cable operators will opt for the less expensive alternative of simply banning indecent programming from leased access channels.[12] To support this prediction, petitioners quote a cable operator's comment to the Commission:

> Restricting indecent programming on leased access channels to a single channel and scrambling such programming to prevent reception unless the subscriber has affirmatively requested access will impose significant costs on the cable operator. If operators are not permitted to recover these costs in full, they will be forced, as a practical matter, to

[11] Judge Wald would disregard *Blum* on the ground that the complaint there challenged the decisions of private actors, while the petition here challenges a federal statute and its implementing regulations. Dissent at 6-7. There is nothing to this. The private actors in *Blum* made their decisions pursuant to detailed state and federal regulations, *Blum*, 457 U.S. 993-95, and the Court evaluated the regulations to determine whether they dictated the private decisions at issue, *id.* at 1006-10.

[12] This argument could not supply state action with respect to section 10(c)'s authorization to operators to prohibit indecent programming on PEG channels. Section 10(b)'s segregation and blocking requirement applies to leased access channels only. We cannot imagine how that requirement could influence an operator's decision about allowing indecent programming on PEG channels.

adopt instead a policy prohibiting all such programming. The single channel requirement would thereby be converted into a *de facto* ban.

Comments of Continental Cablevisions, Inc., at 10 (Dec. 7, 1992). One notices immediately the significant condition in the comment — "If operators are not permitted to recover these costs in full . . . ." Nothing in section 10 specifies that the costs associated with segregation and blocking must be borne by cable operators, and the Commission has yet to consider the matter. The Commission has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation. First Report and Order, 8 F.C.C.R. 998, 1003 ¶ 32 n.29 (1993); *In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation*, 8 F.C.C.R. 5631, 5943 ¶ 502 n.1293 (1993). The situation might well be different if the Commission were to adopt a policy that created a significant economic disincentive for operators to segregate and block indecent programming.

Judge Wald, in her dissent, also predicts that because section 10(b)'s segregation-and-blocking arrangement is "technically and administratively cumbersome," operators will choose to ban indecent speech. Dissent at 8-9. Hence, there is "state action" with respect to section 10(a) and leased access channels.[13] We do

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[13] On this unfounded prediction, on this single assertion, rests the entirety of Judge Wald's reasoning that § 10(a) constitutes state action for leased access channels. But what of PEG access channels, where operators have discretion under § 10(c) to carry indecent programming without any segregation and blocking? Judge Wald, without the support of Chief Judge Edwards, or Judge Rogers, offers a different rationale for detecting state action in § 10(c) — that the provision is a "content-based regulation of protected speech." Dissent at 28. Of course that thoroughly begs the question. The First Amendment protects speech not from private interference but only from *governmental* restraints. One cannot say of § 10(c) that operators might be restricting "protected speech" until one first makes the threshold determination that the actions of the operators are (continued...)

not understand the "technically" part of this proposition. The comments of the National Cable Television Association, Inc., the principal trade association for the cable television industry, mentioned no technical difficulties in implementing section 10(b). And for good reason. Every cable system that has premium or pay-per-view channels already is constantly blocking and unblocking them and thus has the technical capability to perform this task. Perhaps there are smaller systems that do not have such channels. But the Commission took care of that difficulty in its First Order: it gave operators the choice of installing lockboxes (*see infra* p. 36) and retaining the key or numeric code until the customer requests unblocking. First Order and Report, 8 F.C.C.R. at 1009 n.46.[14] As to Judge Wald's point about "administrative" burdens, this is a matter of costs, of who should bear the financial burden of implementing section 10(b). As we have already mentioned, that question will be determined in future proceedings. In deciding this facial challenge to the regulations we are unwilling to speculate about the outcome of those proceedings. Still less are we willing to assume that the burden of implementing section 10(b) represents "such significant encouragement" (*Blum*, 457 U.S. at 1004) that the operators' choice must be deemed to be the choice of the government. The record, sparse as it is on this point, contains material pointing in the opposite direction.

Time Warner's request, which the Commission granted, to allow operators "to provide an additional blocked leased channel for

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[13](...continued)

attributable to the government. Otherwise, whenever cable operators make content-based choices not to carry particular programming on any channel, there would be state action because the speech is "protected" and because the governing statute does not force the operators to carry it.

[14] The Commission mentioned "technical" problems but these dealt with timing — that is, with how quickly operators could implement segregation and blocking. In order to avoid any such problems, the Commission allowed the operators 120 days to implement blocking mechanisms and procedures. First Order and Report, 8 F.C.C.R. at 1009. In this litigation the sufficiency of that time period is not challenged.

indecent programming if the first channel becomes full," is at odds with petitioners' and Judge Wald's prediction that the cost of implementing section 10(b) will force operators to ban indecent programming altogether. First Report and Order, 8 F.C.C.R. at 1009 ¶ 66. Even smaller cable systems were worried about their blocked leased access channels filling up, a concern that makes sense only if they anticipated carrying indecent programming. The burden was on petitioners, as the complaining parties, to show that because of section 10(b), the decisions of operators not to carry this material on leased access channels may be laid at the feet of the government. *Blum*, 457 U.S. at 1004; *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. at 547 n.29. And it is a burden they have not sustained.

Petitioners' third way of establishing state action relies on section 10(d) of the 1992 Act, the provision removing the civil and criminal immunity of cable operators for obscene programming carried on their access channels.[15] Section 10(d), they say, provides — in the words of *Blum*, 457 U.S. at 1004 — "such significant encouragement" to operators to bar indecent programming on access channels that their "choice must in law be deemed to be that of the" government. *Blum* itself rejected a similar argument. Although state regulations penalized nursing homes for failing to "discharge or transfer patients whose continued stay [was] inappropriate," the regulations did not themselves dictate the decision to discharge or transfer. *Id.* at 1009. Therefore, "penalties imposed for violating the regulations add[ed] nothing to [the patients'] claim of state action." *Id.* at 1010. The same logic applies here. Because obscenity is not constitutionally protected, Congress may prohibit its showing on access channels. *See, e.g.*,

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[15] Petitioners contend that section 10(d) is "particularly suspect" because it covers programming that merely "*involves* obscene material." Brief for Petitioners at 31 n.15 (italics added); *see supra* note 1. As petitioners acknowledge, however, the Commission's unchallenged interpretation of the statutory phrase is that operators lose immunity only for material that "is unprotected by the first amendment." First Report and Order, 8 F.C.C.R. at 1005 ¶ 44 n.40.

Sable Communications of California, Inc. v. FCC, 492 U.S. at 124. Nothing in section 10(a), section 10(b), or section 10(c) compels cable operators to refuse to carry indecent programming. The matter is left to their editorial discretion. With discretion comes responsibility. Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control. 47 U.S.C. § 558 (amended 1992). Under the 1992 Act, whenever an operator chooses to carry indecent programming on any channel, it does so against the backdrop of Congress's prohibition against obscenity on cable television. That a cable operator takes this into account in deciding which programs to carry — on any channel — does not convert its refusal to carry indecent programming into state action. *See Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 n.6 (9th Cir.1987), *cert. denied*, 485 U.S. 1029 (1988).[16]

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[16] Three other courts of appeals have found no state action in comparable contexts. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir.1991), *cert. denied*, 112 S. Ct. 966 (1992); *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991); *Carlin Communication, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir.1986). Acting pursuant to a federal statute, telephone companies furnishing billing services to dial-a-porn purveyors blocked their indecent messages until customers, in writing, specifically requested access. The purveyors challenged the statute as a prior restraint in violation of the First Amendment because it required them to classify their messages based on content. The Second and Ninth Circuits found no state action. *Dial Info. Servs. Corp.*, 938 F.2d at 1539, 1543; *Information Providers' Coalition*, 928 F.2d at 871, 877. Both courts of appeals ruled that because the government did not compel telephone companies to supply billing services to dial-a-porn purveyors — which is what triggered the statute's blocking and classification requirements — the telephone companies were not state actors and the First Amendment did not apply. *Dial Info. Servs. Corp.*, 938 F.2d at 1535; *Information Providers' Coalition*, 928 F.2d at 877. *In Carlin Communication, Inc.*, the Eleventh Circuit held there was no state action in a telephone company's decision not to offer sellers of sexually

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Petitioners think that by calling leased access and PEG channels "public forums" they may avoid the state action problem and invoke the line of First Amendment decisions restricting governmental control of speakers because of the location of their speech. But a "public forum," or even a "nonpublic forum," in First Amendment parlance is government property. It is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee. The Supreme Court uses the "public forum" designation, or lack thereof, to judge "restrictions that the government seeks to place on the use of its property." *International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. 2701, 2705 (1992) (italics added). State action is present because the property is the government's and the government is doing the restricting. In this line of cases, regulation of speech on government property traditionally used for public expression — streets and parks, for instance — gets the highest level of scrutiny. *Id.*; *Christian Knights of the Ku Klux Klan v. District of Columbia*, 972 F.2d 365, 372 (D.C.Cir.1992). These are the typical "public forums." Regulation of government property opened for expressive activity, although not traditionally so used, gets the same First Amendment treatment. *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2705. "Nonpublic"

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[16](...continued)

explicit messages access to its prerecorded message service, even though a state regulatory agency studied the company's proposed policy, issued an order "strongly approving" the policy, and authorized a tariff amendment incorporating it. *Carlin Communication, Inc.*, 802 F.2d at 1358, 1359.

These decisions cannot be distinguished on the ground that with respect to cable television, operators must accept non-indecent access programming. What matters — in the dial-a-porn cases and in this one — is whether the government has so injected itself into the private actor's decision triggering federal regulation that the decision may, for purposes of constitutional analysis, be treated as the government's.

forums — nonpublic, that is, in the respect that the government has not opened its property to the public — are treated less stringently. *Id.* All of the Supreme Court's "public forum" cases fall into one of these three categories.[17] Access channels fall into none of them. As petitioners and everyone else knows, these channels are not government owned. The channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers.

Petitioners nevertheless insist that even private property may sometimes be considered a "public forum" for First Amendment analysis. For this proposition they rest upon the italicized portion

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[17] *See, e.g., International Soc'y for Krishna Consciousness v. Lee*, 112 S. Ct. at 2703 (airports owned by Port Authority of New York and New Jersey); *United States v. Kokinda*, 497 U.S. 720, 723 (1990) (sidewalk belonging to post office); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 792 (1985) (fundraising campaign for federal employees established pursuant to executive order); *United States v. Grace*, 461 U.S. 171 (1983) (sidewalk in front of Supreme Court building); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1982) (school district's internal mail system); *Greer v. Spock*, 424 U.S. 828, 830 (1976) (United States Army post); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299 (1974) (advertising space on public rapid transit vehicles); *Adderley v. Florida*, 385 U.S. 39, 40 (1966) (premises of county jail). In *United States Postal Service v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 128, 131 (1981), which petitioners do not cite, the Court held that privately owned mailboxes are not "public forums" and sustained a federal law prohibiting anyone from placing unstamped mailable matter in them. In finding no "public forum," it is uncertain whether the Court meant that mailboxes are simply private property, as Justice Stevens thought in dissent, 453 U.S. at 152, or, however described, are not open to the public for the expression of ideas.

A list of Supreme Court opinions using the phrase "public forum" through the October 1983 Term is contained in Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Form Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1221 n.15 (1984).

of the following statement in *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985): "[a]lthough petitioner is correct that as an initial matter a speaker must seek access to public property or to *private property dedicated to public use* to evoke First Amendment concerns, forum analysis is not completed merely by identifying the government property at issue." The forum in *Cornelius* was the Combined Federal Campaign, created and regulated by the government, and consisting of "an annual charitable fundraising drive conducted in the federal workplace during working hours largely through the voluntary efforts of federal employees." 473 U.S. at 790, 801. The forum was not, in other words, what the Court described as "private property dedicated to public use." While the Court cited no examples of such private property, it may have been referring to the government function cases of *Hudgens v. NLRB*, 424 U.S. 507, 519 (1976), *overruling Amalgamated Food Employees Union v. Logan Valley Plaza*, 391 U.S. 308 (1968); and *Lloyd Corp. v. Tanner*, 407 U.S. 551, 568-69 (1972), in which a similar formulation — the "doctrine of dedication of private property to public use" — made its Supreme Court debut. What makes the *Cornelius* dictum puzzling is that neither *Hudgens* nor *Lloyd* embraced any such doctrine. Far from it. In holding that private shopping centers may not be equated with public streets and parks for First Amendment purposes, *Hudgens* and *Lloyd* found the dedication-of-private-property-to-public-use notion "attenuated," "by no means" constitutionally required, and untenable.[18] *Hudgens*, 424 U.S. at 519; *Lloyd Corp. v. Tanner*, 407 U.S. at 569; *cf. Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 80-81 (1980).

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[18] *Hudgens* and *Lloyd* distinguished the company town case of *Marsh v. Alabama*, 326 U.S. 501 (1946), on the grounds that the private owner of the town assumed "all of the attributes of a state-created municipality," exercised "semi-official municipal functions as a delegate of the State," and performed "the full spectrum of municipal powers," *Hudgens*, 424 U.S. at 519 (quoting *Lloyd*, 407 U.S. at 569). None of the parties to this case even cite *Marsh*. The decision has no bearing on the issue before us for quite obvious reasons. Cable operators do not exercise municipal functions, let alone the "full spectrum" of municipal powers.

Given the holdings of *Hudgens* and *Lloyd*, the dictum in *Cornelius* cannot serve as a basis for resurrecting this rejected doctrine. And it cannot support a determination that cable access channels are so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system. In saying this, we recognize that unlike our examples of supermarket bulletin boards and private computer networks, the government — in the 1984 Act — compelled cable operators to provide leased access and, if the franchising authorities so demand, PEG access channels. This had the effect, as the Commission found in its First Report and Order in this case, 8 F.C.C.R. at 1001-02 ¶ 22, and as the Supreme Court had anticipated in *Midwest Video*, 440 U.S. at 701, of imposing "common-carrier obligations on cable operators." In the communications context, however, the fact that a regulated entity is a common carrier — that under certain circumstances it must provide communications facilities to those who desire access for their own purposes (440 U.S. at 701) — does not render the entity's facilities "public forums" in the First Amendment sense and does not transform the entity's discretionary carriage decisions into decisions of the government. *See Information Providers Coalition v. FCC*, 928 F.2d at 877; *Carlin Communications*, 827 F.2d at 1297; *see also Sable Communications of California, Inc. v. FCC*, 492 U.S. at 133 (Scalia, J., concurring). A heavily regulated private carrier of electricity may cut off service without having its decision scrutinized as if it were a state decision, *Jackson v. Metropolitan Edison Co.*, 419 U.S. at 358-59, and a private cable operator may refuse to carry indecent programming without having its decision tested by First Amendment principles applicable to the government alone.

* * *

Because we find no state action here and because that essential element cannot be supplied by treating access channels as public forums, we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c).

III

We turn now to section 10(b) of the 1992 Act. The provision applies to cable operators who decide to carry indecent programming on leased access channels. As implemented by the Commission's regulations, section 10(b) directs these operators to segregate leased access programming "identified by program providers as indecent" on a particular leased channel (or channels, if more than one is needed) "available to subscribers only with their prior written consent . . . ." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(b)). Upon receipt of a subscriber's "written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old," the operator must make the programming available within thirty days. *Id.* Petitioners detect four constitutional infirmities in this scheme: (1) section 10(b) is not the least restrictive means of achieving the government's interest; (2) it impermissibly discriminates against indecent programming on leased access channels; (3) it constitutes an invalid prior restraint; and (4) it is unconstitutionally vague.

"All questions of government are ultimately questions of ends and means." *National Fed'n of Fed. Employees v. Greenberg*, 983 F.2d 286, 290 (D.C.Cir.1993). So here. The end of section 10(b) is not in doubt — it is to "limit the access of children to indecent programming." Pub. L. No. 102-385, § 10(b), 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. § 532(j)(1)). That the government has a "compelling interest in protecting the physical and psychological well-being of minors," which "extends to shielding minors from the influence of literature that is not obscene by adult standards," is beyond dispute. *Sable*, 492 U.S. at 126. Since the First Amendment permits the government to achieve that aim so long as it uses the least restrictive means, *id.* at 126, the first question section 10(b) raises is whether its segregation and blocking requirements are such means.

In deciding this issue, it is essential to begin by comparing *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), with *Sable*. In *Pacifica*, the Commission ruled that an afternoon radio broadcast

containing offensive, sexually explicit language violated a federal prohibition against indecent radio communications. *Pacifica*, 438 U.S. at 731-33. Underscoring the nature of radio broadcasting — its "uniquely pervasive presence" making protection of unwilling listeners by broadcasting prior warnings impossible, *id.* at 748, and its accessibility to children, *id.* at 749-50 — the Court held that the Commission could prohibit a radio program containing indecent words during times when there was a reasonable risk children would be in the audience, *id.* at 732, 750. Eleven years later, in its next encounter with federal regulation of media indecency, the Court struck down legislation totally banning indecent interstate commercial telephone messages. *Sable*, 492 U.S. at 117. *Sable* distinguished *Pacifica* on the bases that children do not have the same access to commercial telephone communications as they do to radio broadcasting, and that indecent telephone communications do not present the problem of surprising unwilling listeners. *Id.* at 127-28. The *Sable* Court found that the total ban on indecent commercial telephone communications limited "the content of adult telephone conversations to that which is suitable for children to hear." *Id.* at 131.[19] Given these considerations, the Court ruled there were less restrictive ways, short of a total ban, to accomplish the government's goal of protecting children from indecency. *Id.*

From *Pacifica* and *Sable*, we distill two principles applicable to this case. First, the constitutionality of indecency regulation in a given medium turns, in part, on the medium's characteristics. Second, in fashioning such regulation, the government must strive to accommodate at least two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in having access to such material. As to the first, it is apparent that leased access programming has far more in common with the radio broadcast in *Pacifica* than with the telephone communication in *Sable*. Nearly fifty-six million households, more than sixty percent of all households with televisions, subscribe to cable service. H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 56 (1992). Most cable

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[19] That finding necessarily entails the proposition that there are conversations unsuitable for children to hear.

subscribers do not or cannot use antennas to receive broadcast television services. *Id.* at 57. Hence "[c]able television has become our Nation's dominant video distribution medium." S. REP. NO. 92, 102d Cong., 1st Sess. 3 (1991). The cable audience, like the radio broadcast audience, "constantly tun[es] in and out," so that prior warnings will not "completely protect the . . . viewer from unexpected program content." *Id.* Unlike services that subscribers affirmatively choose and pay for, such as dial-a-porn or cable pay-per-view and premium channels, leased access channels automatically come into all cable subscribers' homes. Indecent leased access programming thus hardly qualifies as an "invited guest," *see* Judge Wald, dissenting, at 21. A cable subscriber no more asks for such programming than did the offended listener in *Pacifica* who turned on his radio. Cable television now provides a vast amount of information in an easily accessible way. In this respect, it is similar to broadcasting. Consequently, it makes no sense to say that the First Amendment requires a household either to forego cable television altogether or risk exposure to indecency. For purposes of regulating indecency on those channels, we conclude that cable television is sufficiently pervasive and easily accessible to children to justify the government's attempts to regulate indecency on cable channels.

In light of the nature of leased access programming, does section 10(b) represent the least restrictive means of furthering the government's goal of protecting children from indecent programming? Petitioners say no, Congress could have accomplished what segregation and blocking achieve either by continuing to rely entirely on the 1984 Act's provision giving cable viewers the option of voluntarily blocking indecent programming, 47 U.S.C. § 544(d)(2)(A), or by confining indecent programming to late at night — a "safe harbor." We agree with the government that, given the pervasiveness of cable television and its accessibility to children, neither of these options would have achieved the government's aims. As to subscriber-initiated blocking, the Commission concluded that the type of programming with which section 10(b) is concerned presents special problems such a system does not solve. Leased access programming "may come from a

wide variety of independent sources, with no single editor controlling [its] selection and presentation," placing a cable viewer in risk of being intermittently and randomly confronted with patently offensive displays of sexual or excretory activities or organs. First Report and Order, 8 F.C.C.R. 998, 1000 ¶ 15 (1993). To prevent exposing children to such programming under a voluntary blocking system, cable viewers would have two, equally unacceptable options. Either they could continually activate and deactivate their lockboxes, inevitably risking a slip up or a lapse that would expose their children to indecency, or they could install lockboxes permanently, thereby giving up leased access programming altogether. *Id.* at 1000-01 ¶ 15; *cf. Dial Info. Servs.*, 938 F.2d at 1542 ("voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn as . . . would [a] presubscription requirement"). Nor would a "safe harbor" period protect children from indecent programming as effectively as section 10(b)'s segregation and blocking requirements. Even during late hours, some unsupervised children will be watching cable television and thereby have access to indecent programming, a risk that section 10(b) eliminates. Not only do section 10(b)'s segregation and blocking requirements most effectively further the compelling interest in protecting children from indecent leased access programming, but also this provision minimally burdens those adults who wish to watch such material. In this respect, section 10(b) differs markedly from the regulations considered in *Pacifica* and *Sable*. In *Pacifica*, an adult could not tune into indecent broadcasting at times when "there [was] a reasonable risk that children [might] be in the audience," 438 U.S. at 732; and in *Sable*, an adult could never dial into indecent commercial telephone messages, 492 U.S. at 131. By contrast, section 10(b) provides that those adults desiring to watch indecent programs on the channel the operator has set aside can do so no later than thirty days from the date of their request. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(c)). In fact, segregation and blocking appear to accommodate the interests of those viewers who want indecent programming *better* than would a safe harbor system, under which

cable viewers would be confined to watching such programming during designated, often inconvenient time periods.

Given its effectiveness in limiting the exposure of children to indecent programming and its insignificant restriction of adults' access to such material, we conclude that section 10(b) passes the least restrictive means test.

Petitioners' second argument is that the segregation-and-blocking system unconstitutionally discriminates against programming on leased access channels. Section 10(b), according to petitioners, embodies "speaker-based discrimination" in violation of the First Amendment and the equal protection component of the Fifth Amendment because similar regulations do not apply to other types of channels. We find this idea tenuous. Section 10(b) no more singles out indecent leased access programming for regulation than did the 1984 Act, which petitioners tout as the epitome of constitutionality. *See infra* p. 14. They ignore entirely that a blocking system has been in place for all channels, and thus with respect to all "speakers" on cable television, since 1984. As we have mentioned, the 1984 Act, in "order to restrict the viewing of programming which is obscene or indecent," required cable operators to sell or lease requesting subscribers "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2)(A). These devices, commonly known as lockboxes or "parental control devices," use a key or a numeric code to lock out certain channels. DANIEL L. BRENNER, ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.09[3][c], at 6-98 (1994). Employing the devices, subscribers can "decide whether to block a channel and have the operator keep that channel out of their home by the flick of a switch." *Id.* Section 10(b) of the 1992 Act altered this system so that blocking on leased access channels carrying indecent programming is now

operator-initiated, with subscribers retaining the option of having the channel unblocked.[20]

From the perspective of those petitioners who show or wish to show indecent programs on these channels, the difference between the two systems amounts to this: under the 1984 Act, their material got into the home unless the subscriber locked it out; under the 1992 Act, their material does not get into the home unless the subscriber invites it in. Either way the programmers' products are available to those who want to watch them. Of course, there will always be subscribers disinclined to any action regardless of what system is in place. Before 1984, their television sets would receive the indecent programs shown on these channels; after 1992, they would not. But we see no reason why leased access programmers should necessarily retain the advantage of such inertia, and we can conceive of no constitutional principle entitling them to do so. Furthermore, there is little difference between section 10's treatment of indecent leased access programming and the 1992 Act's handling of pay-per-view programming. Under current regulations, pay-per-view programs are, in effect, blocked and segregated: as the "negative option billing" provision requires, a subscriber will not receive such programs unless he or she specifically so requests. 47 U.S.C. § 543(f) ("A cable operator shall not charge a subscriber for any service or equipment that the

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[20] Section 10(b)'s regulatory scheme parallels the one Congress imposed on the dial-a-porn industry. Under 47 U.S.C. § 223(c)(1), telephone subscribers can obtain access to obscene or indecent telephone messages only by making a written request to their telephone carriers. The Second and Ninth Circuits have rejected constitutional challenges to this statute. *Dial Info. Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir.1991), *cert. denied*, 112 S. Ct. 966 (1992); *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991); *see supra* note 16.

subscriber has not affirmatively requested by name.'").[21] If that is constitutional, and it surely is, so is section 10(b).

We reach the same conclusion when we consider the matter from the perspective of those petitioners who are cable subscribers. For the purpose of this analysis, subscribers may be divided into two classes — those who do, and those who do not, want to receive indecent programming on leased access channels. Before the 1992 Act, viewers in the do-not-want category always had to take the initiative and to bear the expense of blocking indecent programming from their homes. It was up to them to request their cable operators to provide lockboxes to them, and they paid for the equipment. With the 1992 Act, it is the do-want class who must take the initiative: they are now the ones who have to make a request, in writing, for access to indecent programming.[22] Under both systems, adults who wish to receive this type of material receive it. Certainly, as to the 1984 Act's lockbox system, there can be no constitutional objection. If individuals do not want indecent material coming into their homes, they have every right to keep it out. Nothing in the Constitution gives cable operators and programmers the right to demand that subscribers watch whatever they produce. The corollary to the freedom to bring expressive material into the home is the freedom not to bring it in. By requiring lockboxes to be made available upon request, the 1984 Congress facilitated the freedom of viewers and thereby advanced

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[21] If the operator decides to offer a "premium channel" free of charge — that is a "pay service offered on a per channel or per program basis, which offers movies rated by the Motion Picture Association of America as X, NC-17, or R" the operator must give at least 30 days notice of the offering and block the channel at the subscriber's request. 47 U.S.C. § 544(d)(3).

[22] Viewers preferring "unimpeded, selective access to some but not all" indecent programming, *see* Judge Wald, dissenting, at 14, still have the option of requesting access to a blocked channel and installing a lockbox that enables them to block indecent programming they do not want their children to see. Judge Wald apparently agrees that lockboxes are effective means of restricting access to indecent programming. *See id.* at 23-25.

First Amendment values. It cannot make a constitutional difference that the 1992 Congress, through section 10(b), has also facilitated viewer preferences by shifting the burden of making a request from the do-not-want class to the do-want class of subscribers.[23]

To say, as petitioners do, that section 10(b) distinguishes between indecent speech and other types of speech, or that it singles out leased access channels from other cable channels, supplies only a description, not an analysis. Of course section 10(b) does what petitioners say, but it does so for a particular, and for a constitutionally permissible reason — to protect children and to enhance the ability of parents to shield their children from the influence of "adult" programming. *See Ginsberg v. New York*, 390 U.S. 629, 639-40 (1968). The notion that Congress could not take

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[23] Petitioners do not contend that any stigma attaches to a subscriber requesting unblocking or that subscribers would otherwise be deterred from making a request. Playboy's pay-per-view channel, to which subscribers must also request access, apparently has a large audience. *See* Comments of New York Citizens Committee for Responsible Media, at 11 (Dec. 29, 1992). Moreover, the 1984 Act and the 1992 Act contain provisions protecting the privacy of subscribers in their dealings with cable operators. Pub.L. No. 102-385, § 20, 106 Stat. 1460, 1497-98 (1992) (codified at 47 U.S.C. §§ 551(a)(2), 551(c)(2)); Pub.L. No. 98-549, § 631, 98 Stat. 2779, 2794-95 (1984) (codified at 47 U.S.C. § 551). Although the parties do not mention the case, it is worth noting that for these reasons *Lamont v. Postmaster General*, 381 U.S. 301 (1965), is distinguishable. The Supreme Court there struck down a statute directing the Post Office to detain mail containing "communist political propaganda" and to deliver it only upon the addressee's affirmative request. *Id.* at 302, 307. The law set federal officials "astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail," *id.* at 306, and the Court rested its decision on the "narrow ground" that this would deter persons from requesting such mail because they "might think they would invite disaster if they read what the Federal Government says contains the seeds of treason," *id.* at 307. It is not the federal government, but private cable operators, who receive the unblocking requests, and federal law forbids the operators from revealing what choice any particular subscriber has made.

one step in this direction without imposing section 10(b)-like requirements on all cable channels is not only untenable (*see United States v. Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993)), but also inconsistent with the least restrictive means test we have just discussed. That constitutional principle confines the scope of the solution to the extent of the problem. *See Simon & Schuster, Inc. v. New York Crime Victims Bd.*, 112 S. Ct. 501, 511-12 (1991). To repeat what we wrote earlier, leased access programming comes from a wide variety of sources; no single entity controls its selection and presentation; no single editor is responsible for what is shown. What will appear on these channels, and when, is anyone's guess. Without segregation and blocking, cable viewers risk subjecting themselves and their children to sporadic encounters with patently offensive displays of sexual or excretory activities or organs. First Report and Order, 8 F.C.C.R. 998, 1000 ¶ 15 (1993). Only PEG access channels are comparable. But they did not pose dangers on the order of magnitude of those identified on leased access channels, and Congress knew that if this situation changed, local franchising authorities could respond by issuing "rules and procedures" or other "requirements" pursuant to the 1984 Act, 47 U.S.C. § 531(a) & (b), or by eliminating PEG access channels altogether, 47 U.S.C. § 531(a). If Congress nevertheless had stretched section 10(b) to cover other cable channels, if it had not concentrated only on leased access channels, it could have been charged with having regulated more extensively than necessary. While there undoubtedly is indecent programming on other cable channels,[24] the Commission found that cable

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[24] Operators have the power to impose a segregation and blocking system on the vast majority of their non-access channels, because their editorial control over such channels is unfettered by federal regulation. The only exception is for those channels they must set aside for local broadcasting to fulfill their "must-carry obligations." *See generally* 47 U.S.C. §§ 534, 535; *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445 (1994). Broadcasting, however, is regulated under a separate statutory scheme limiting indecent programming to the late evening hours. *See generally Action for Children's Television v. FCC*, 11 F.3d 170 (D.C.Cir. 1993), (continued...)

operators generally provide it through "per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." First Report and Order, 8 F.C.C.R. at 1001 ¶ 19 n.20. Indeed, petitioners' examples of indecency on other nonleased access channels — the Playboy Channel and "Real Sex" on HBO — fall into this category. In short, there is no constitutional rule forbidding Congress from addressing only the most severe aspects of this problem, and there are constitutional doctrines, such as narrow tailoring and least restrictive means, that may have constrained it from going further than necessary.

Petitioners' two remaining contentions regarding section 10(b) merit only brief discussion. That the Commission's regulations give a cable operator up to thirty days to comply with a subscriber's request to unblock a leased access channel does not entail a "prior restraint" in violation of the First Amendment.[25] *Implementation*

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[24](...continued)

reh'g in banc granted, 15 F.3d 186 (D.C. Cir. 1994). As to PEG access channels, section 10(c) of the 1992 Act gives cable operators "broad discretion" to decide how to treat indecent programming carried there, and may if they choose impose a blocking system. Second Report and Order, 8 F.C.C.R. 2638, 2641 ¶ 19. According to the Commission, Brief for the Commission at 45, operators are not prohibited from imposing a segregation and blocking system for PEG channels. *See* First Report and Order, 8 F.C.C.R. at 1005 ¶ 43 n.39. Thus, under section 10(b) operators are *required* to segregate and block indecent programming carried on leased access channels, while they are generally *permitted* to do so on other channels.

[25] Petitioners also contend that § 10 as a whole constitutes a prior restraint because cable operators are "pressured to censor" indecent programming according to a regulatory scheme that "dictates the contours of this censorship." Although framed in different terms, this argument is essentially identical to petitioners' claim regarding state action, which we discussed and rejected. *See supra* pp. 10-27. We reiterate that cable operators who decide to prohibit indecent programming on access channels are not state actors. Consequently, their banning of such material cannot (continued...)

of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701(c)). A prior restraint is an administrative or judicial order restraining future speech. *See, e.g., Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993); *American Library Ass'n v. Barr*, 956 F.2d 1178, 1190 (D.C. Cir.1992). Yet nothing in section 10(b) forbids speakers from speaking. *Compare Vance v. Universal Amusement Co.*, 445 U.S. 308, 311 (1980); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554 (1975). The offerings of leased access programmers will air. Subscribers wishing to see indecent speech may not have their wishes fulfilled instantaneously,[26] just as new subscribers to cable television may have to wait for their services to be hooked up. The latter is not a prior restraint, and neither is the former. *See Dial Info. Servs. Corp.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 878. The government is neither prohibiting indecent programming in advance, nor requiring anyone to obtain the government's stamp of approval before a program airs.

Petitioners' remaining argument is that section 10(b) is impermissibly vague because leased access programmers must identify for cable operators which of their programs are indecent. Programmers thus must "worry about what a cable operator may 'reasonably believe' to be indecent." Brief for Petitioners at 46. The Commission's definition of indecent programming essentially tracks the definition of broadcast indecency this court reviewed in *Action for Children's Television v. FCC*, 932 F.2d 1504, 1507-08 (D.C. Cir.1991), *cert. denied*, 112 S. Ct. 1282 (1992) (*ACT II*). *Compare Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993

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[25](...continued)

constitute a prior restraint. *Cf. Dial Info. Servs.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 877.

[26] The FCC determined that a written request, rather than a telephonic one, was necessary to enable a cable operator to ascertain that the requestor is over eighteen years old. First Report and Order, 8 F.C.C.R. at 1009 ¶ 67.

(1993) (to be codified at 47 C.F.R. § 76.701(g)). In *ACT II*, 932 F.2d at 1507-08, and in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (*ACT I*), we held that the Supreme Court's *Pacifica* decision foreclosed the question whether this definition of indecency was unconstitutionally vague: "if acceptance of the FCC's generic definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction." *ACT I*, 852 F.2d at 1339. No intervening Supreme Court decision affects our determination. There is nothing to petitioners' lament that access programmers will have trouble discerning what cable operators consider indecent. Since the Commission will resolve any conflicts between a programmer and an operator on this issue, First Report and Order, 8 F.C.C.R. at 1010 ¶ 75, programmers must ultimately concern themselves with potential *Commission* determinations regarding indecency. In this respect, they are in precisely the same situation as the petitioners in *ACT I* and *ACT II*.

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Section 10(b)'s segregation and blocking requirements satisfy the least restrictive means test; do not impermissibly single out leased access programming for regulation; do not constitute a prior restraint on speech; and are not, because of the definition of indecency, unconstitutionally vague.

The petitions for review are denied.

WALD, *Circuit Judge*, with whom TATEL, *Circuit Judge*, and, with respect to Parts II and III, ROGERS, *Circuit Judge*, join, dissenting: Lurid descriptions of programming that may well cross over the line into obscenity and merit no First Amendment protection at all should not obscure what this case really is about. *See* Majority opinion ("Maj. op.") at 19-20. This case is *not* about obscenity; it concerns significant restrictions on a class of speech that is unquestionably entitled to constitutional protection, although possibly offensive to some audiences. *See Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). Under the broad definition of "indecency" used in this regulation, affected speech could include programs on the AIDS epidemic, abortion, childbirth, or practically any aspect of human sexuality.[1]

The Denver Area Educational Television Consortium's critically-acclaimed program The 90's Channel, transmitted on the leased access channels of eight cable systems, serving 500,000 customers, provides information and opinion on a broad range of subjects in a self-described "unvarnished" cinema-verite style. The 90's Channel has on occasion included segments on how to do a self-help gynecological exam, a documentary on the controversial

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[1] The regulations define "indecent" programming as programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993). The definition thus extends to any programming that includes "patently offensive" verbal descriptions or visual depictions of sexual or excretory activities, regardless of the literary, artistic, political, or scientific merit of the work as a whole. The regulations require leased access programmers to self-certify whether their work is "indecent" under this definition, at the risk of being barred from televising future work if they err in that judgment. *First Report and Order*, 8 F.C.C.R. 998, 1005 ¶ 43, 1007 ¶ 51, 1010 ¶ 75 (1993). That the regulations will likely result in overdeterrence by risk-averse programmers seeking to avoid the professional "death penalty" imposed for certification errors seems quite apparent. The result will inevitably be an extremely broad class of programming silenced by the regulations.

Robert Mapplethorpe art exhibit, and a traditional fertility festival in Japan featuring a procession of marchers carrying images of human genitalia. Each of these programs included descriptions or depictions of sexual activities or organs that might well be considered "patently offensive" as measured by contemporary community standards. Self-applying the FCC's definition of "indecency," then, it is not at all improbable that a cable operator might declare all these programs "indecent," and find itself required under the regulations either to ban or to block them.

"Indecency" is not confined merely to material that borders on obscenity — "obscenity lite." Unlike obscenity, indecent material includes literarily, artistically, scientifically, and politically meritorious material. Indeed, by definition, it includes all "patently offensive" material that has any of these kinds of merit, and cannot be branded as obscene under the standard established by the Supreme Court in *Miller v. California*, 413 U.S. 15, 24 (1973). In many instances, the programming's very merit will be inseparable from its seminal "offensiveness." A bowdlerized documentary on the Mapplethorpe exhibit which did not include some description or depiction of Mapplethorpe's sexually explicit photographs themselves, for example, would hardly be an informative statement on the artistic and political debate the exhibit engendered. Yet the very act of including such powerful visual or audio images, which to many viewers are "patently offensive," would court an "indecency" citation by the FCC if the cable operator did not pull the plug or consign the program to a blocked channel. It is these kinds of portentous decisions about art, politics, science and "indecency" which are implicated in this case.

While we accept that the government may have a compelling interest in protecting children from indecent programming, we agree with Judge Edwards that that interest must be pursued in the context of helping parents to make viewing choices for their

children as to the programming they watch inside the home.[2] Additionally we note that producers of such programming also have a constitutional right against unnecessary governmentally-induced restrictions on their right to disseminate programs to willing adults. The legal issue devolves into one of whether the FCC's "indecency" regulations unduly burden the First Amendment rights of speakers and adult listeners on access channels of privately-owned cable systems. Before turning to this complicated question, however, we must satisfy ourselves that state action is present in Congress' statutory scheme.

I. State Action Is Involved in Sections 10(a) and (b)

The First Amendment commands that "Congress shall make no law . . . abridging the freedom of speech . . . ." Our state action analysis begins with the law that Congress has made in this case. Sections 10(a) and (b) of the 1992 Cable Act impose a disjunctive scheme regulating indecent speech. In tandem, they require that cable operators either ban or block "indecent" speech on leased access cable channels. The majority insists, however, that § 10(a) is exempt from constitutional scrutiny because it involves no state-imposed burden on speech. Instead, they say, § 10(a) merely restores to cable operators the "editorial control" taken away from them in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Act"), which mandated the creation of publicly accessible leased channels and forbade operators from controlling the content of programs on those channels. Maj.

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[2] We note that the Supreme Court has never actually passed on the FCC's broad definition of "indecency." *See Action for Children's Television v. FCC*, 852 F.2d 1332, 1338-39 (D.C. Cir. 1988) (acknowledging that in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court never specifically addressed whether the FCC's generic definition of indecency was unconstitutionally vague, but arguing that because the Court "implicitly" approved the definition by relying on it, lower courts are barred from addressing the vagueness issue on the merits).

op. at 15. In fact, § 10(a) does not restore any genuine editorial control to cable operators over indecent material. Instead § 10 insists that a cable operator either ban a governmentally-defined category of "indecent" speech outright or, if it declines, relegate it to a separate channel and block *all* households from receiving that channel unless they specifically request it in writing up to 30 days in advance. Sections 10(a) and (b) are co-dependent parts of one statutory scheme regulating speech. They present cable operators with an "either-or" command: accentuate the positive by banning indecent leased access programming under § 10(a), or eliminate the negative by blocking it under § 10(b). There is no "Mr. In-between." The operator can no longer in close cases let the program air on a regular leased access channel, or televise it at a later hour when fewer children are watching, as he might on a regular commercial channel. Clearly, §§ 10(a) and (b) are inseparable parts of an integrated statutory regime that aims out front to curtail cable transmission of indecent speech, and affords cable operators only the most limited choice as to how to achieve that end.

The purpose and effect of §§ 10(a) and (b) are clear enough. As their chief congressional sponsor explained, they "*forbid* cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels." 138 Cong. Rec. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms) (emphasis added). That forthright statement would ordinarily end the state action inquiry. When Congress passes a statute whose avowed purpose, and effect, is to *forbid* or severely restrict communication of a certain category of speech defined by content, state action is usually conceded. *Cf., e.g., Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548 (1983) (congressional enactment may have differential effect on some categories of speech, so long as the statute is not "intended to suppress" a content-defined category of speech).

The majority argues, however, that because § 10(a) is couched in permissive language, not explicitly *requiring* the operator to ban indecent speech, there is no state action. Maj. op. at 12. But in effect, § 10 says "an operator *may* ban, or in the alternative *must*

block." To illustrate the effect of the "may" language of § 10(a) when used in the context of § 10(b), we point out that the operator's options — and the burden on speech — would be no different if the regulation were expressed in any of the following terms:

1. "an operator *must* ban, or in the alternative *must* block";

2. "an operator *may* block, or in the alternative *must* ban"; or

3. "an operator *may* ban, or in the alternative *may* block, but these alternatives are to the exclusion of all others."

All these formulations, linguistically distinct, are logically and functionally equivalent. Each *commands* that the cable operator *either* ban *or* block indecent speech. Yet the §§ 10(a) and (b) option is no different in its effect. Only empty formalism would elevate Congress' choice of the nominally permissive "may" language of § 10(a) to demonstrate the absence of state action, when § 10(b) lurks in the shadows, ready to pounce.[3]

Senator Helms's statements in floor debate that § 10 merely restores editorial control to cable operators do not do much to bolster the government's anti-state action argument. *See* 138 CONG. REC. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms) ("this is not governmental action" but "action taken by a private party"); *id.* at S649 (statement of Sen. Helms) (in colloquy, responding affirmatively to the statement, "So this is not Government censorship"). In light of Sen. Helms's earlier statement that the purpose of § 10 was to "forbid" cable operators from transmitting indecent programming, these later statements

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[3] Although the majority does not say so expressly, its analysis of § 10(b) as the "least restrictive means" for protecting children presumes that state action is implicated. Yet, if § 10(a) does not implicate state action, it is difficult to see why § 10(b) does either, since the cable operator is no more *required* to segregate-and-block indecent programming under § 10(b) than it is to ban indecent programming under § 10(a). In either case, the operator can avoid one provision entirely by "voluntarily" electing to submit to the *other* provision.

suggest only a belated awareness of the section's constitutional infirmities, and an attempt to put a gloss on the directive. But an unconstitutional sow's ear cannot be so easily converted into a constitutional silk purse.

The majority concedes that if the cable operator's decision to ban indecent programming under § 10(a) is state action, the regulation is a form of state censorship and cannot survive First Amendment scrutiny. Maj. op. at 11. But they go on to cite *Blum v. Yaretsky*, 457 U.S. 991 (1982), for the proposition that the cable operator's decision to ban indecent programming under § 10(a), however constrained, is *not* state action, but rather the action of a private party without a sufficiently close "nexus" to the government so that the state may be held responsible for his actions. Under *Blum*, the state can be held responsible for a private decision only if the state exercises coercive power on the private actor, provides "significant encouragement" for the decision, or transfers into private hands powers traditionally exercised by the state. *Id.* at 1004-05. Here, the majority contends, none of those criteria is met.

I do not think this case fits the *Blum* model. As *Blum* itself instructs, "[f]aithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." *Id.* at 1003. In *Blum*, nursing home patients challenged decisions by private physicians and nursing home administrators — based on "medical judgments . . . according to professional standards that are not established by the State," *id.* at 1008 — to discharge or transfer them without procedural safeguards. The *Blum* complainants sought to hold those private decisionmakers to due process standards applicable to state actors; they did "not challeng[e] particular state regulations or procedures . . . ." on due process grounds. *Id.* at 1003. Here, in contrast, petitioners do not seek to apply First Amendment standards to the "actions taken by cable operators with respect to indecent programming," Maj. op. at 11. Instead, they mount a direct facial challenge to a federal statute and implementing regulations which have the avowed purpose and effect of restricting communication of a content-defined class of constitutionally-protected speech. The

majority's *Blum* analysis thus asks, and answers, the wrong question. The core question here is not whether the cable operators' private decisions implicate state action; whatever the answer to that question, we have state action in the government's own ban-or-block scheme, which is what is at issue here.[4]

As the Supreme Court explained in *Lugar v. Edmondson Oil Co., Inc.* — decided the same day as *Blum* — the point of the state action inquiry is to determine whether "the conduct allegedly causing the deprivation of a federal right . . . [is] fairly attributable to the state." 457 U.S. 922, 937 (1982). To answer that question, we ask first whether the deprivation is "caused by the exercise of some right or privilege created by the State or by a rule of conduct

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[4] The confusion may stem from the way the argument was posed and addressed in the original panel opinion. There, the government conceded that if cable operators' decisions to ban indecent programming under §§ 10(a) and 10(c) *were* state action, the statute would impose a constitutionally impermissible censorship regime. *Alliance for Community Media v. FCC*, 10 F.3d 812, 820 n.9 (D.C.Cir.1993), *vacated*, 15 F.3d 186 (1994). The panel held that cable operators' decisions were indeed state action. *Id.* at 818-22. The majority rejects that conclusion. But the majority's next move is a *nonsequitur*: it simply does not follow that, if the cable operators' decisions are *not* state action, then the statute itself is not state action, and is exempt from constitutional scrutiny. Indeed, it strikes me as a wholly untenable proposition that a statute duly enacted by the Congress of the United States could be anything other than state action. The majority might better have argued that although the statute itself is plainly state action, it effects no abridgement of freedom of speech because it does nothing more than restore editorial control to cable operators. In that regard, they might have a stronger argument if the statute withdrew governmental restrictions on cable operators' control over leased and PEG access channels evenhandedly and across the board, without itself imposing differential regulations discriminating (as this statute does) on the basis of content in order to suppress a particular content-defined category of speech. *See infra*, Part IV.A. But instead of pursuing that line of reasoning, the majority would immunize the *statute itself* from constitutional scrutiny on grounds that cable operators' decisions under §§ 10(a) and 10(c) are not state action.

imposed by the State or by a person for whom the State is responsible"; and second, whether the "party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor." *Id.* Here, the deprivation of First Amendment rights is "caused by . . . a rule of conduct imposed by the State" — the rule requiring cable operators to ban or block a category of programming.[5] And the parties "charged with the deprivation," Congress and the FCC, are clearly "state actors."

Even if *Blum* did provide a legal analogy, which it does not, the factual record places it a galaxy apart. There is pressure in this scheme to push cable operators to ban indecent programming outright. Statements in the agency record by cable operators say that they view the § 10(b) segregation- and-blocking arrangement to be so technically and administratively cumbersome as to render it highly unattractive and indeed for many "unworkable." Joint Appendix ("J.A.") 195-97, 200, 253. *See also First Report and Order*, 8 F.C.C.R. at 1009, ¶ 69 (acknowledging technical and administrative burdens of blocking scheme).[6]

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[5] As Justice White explained in his concurrence in *Blum*, the private parties' decisions there were not based on any rule imposed by the state. 457 U.S. at 843 (White, J., concurring).

[6] The Commission noted that "the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems" and "may require considerable adjustments . . . in terms of rearranging existing services . . . ." *First Report and Order*, 8 F.C.C.R. at 1009 ¶ 69. *See also* J.A. 253 (comments of Time Warner Entertainment Company, noting "technological problems" faced by nonaddressable systems). "In addition, the new regulations will require cable operators to establish new procedures for subscriber notification . . . and for the processing of requests of leased access users and of subscriber requests for this channel, etc." 8 F.C.C.R. at 1009 ¶ 69. Finally, the Commission noted the special difficulties faced by "systems that require trapping devices to circumscribe access to these services." *Id.* Some "trapping" technology would require the operator to send out employees to place signal-interdicting "traps" at each subscribing household, and to remove them when the subscriber requested the blocked service. *See* J.A.

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In addition, as the majority itself concedes, Maj. op. at 23-24, the Commission has yet to decide who will absorb the potentially high cost of the § 10(b) segregation-and-blocking scheme. If the cost falls on cable operators, as it presumptively must at least temporarily until the Commission authorizes a shift to subscribers or lessees, operators have a strong financial incentive, as well, to ban rather than block. *See* J.A. 200-01 (comments of Community Antenna Television Association, Inc.). Somewhat puzzlingly, the majority argues that because the Commission has not yet decided whether to allow cable operators to shift these costs, we do not know if operators will have a financial incentive to ban rather than block, and therefore petitioners have not met their burden of showing state action. Maj. op. at 23-24. That seems to me a notion at odds with our traditional constitutional test for state action. Surely the agency's delay in stating who will ultimately bear the financial burden of its scheme cannot postpone constitutional review indefinitely, once the scheme is in operation. And clearly the *present* regulations do not authorize operators to shift the costs of segregation-and-blocking to subscribers or lessees. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, 8 F.C.C.R. 5631 ¶¶ 506, 516-20 (1993) (Commission sets maximum rates operators may charge lessees, based on annual calculation of "implicit fee" paid by nonaffiliated commercial programmers, with no provision for cost-based adjustments). Until the Commission takes affirmative measures to allow cost-shifting, any operator

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[6](...continued)

244 (comments of National Cable Television Association, Inc.). Nor are the incentives created by these complexities simply a matter of whether the costs are recoverable. Even if cable operators were allowed to recover their costs under the § 10(b) blocking scheme, cancelling out its cost disadvantages, opting for the § 10(b) blocking scheme would still require the cable operator in many cases to hire, train and supervise additional personnel, invest in new equipment, and develop and implement additional recordkeeping procedures. *See* J.A. 200. Sound management principles suggest that if either alternative would produce the same net revenue, the less technically and administratively complex option would be preferred.

undertaking segregation-and-blocking under § 10(b) bears the expense without any promise of recoupment. He therefore has a financial incentive to ban rather than block.

On the basis of the combined technical, administrative, and financial burdens imposed on cable operators under § 10(b), I have no difficulty even under a *Blum*-type rationale in concluding that the § 10 regulatory scheme "significantly encourages" them to ban indecent speech, thereby converting the cable operator's decision to ban under § 10(a) into state action.[7]

In sum, §§ 10(a) and (b) in tandem constitute state action.[8]

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[7] For the reasons detailed in Part IV.B. *infra*, I believe § 10(a) would be constitutionally impermissible even if it stood alone -- which, of course, it does not. Given the structure of the statutory provisions affecting leased access programming, and their avowed purpose to "*forbid* cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels," 138 CONG. REC. S646 (daily ed., Jan. 30, 1992) (statement of Sen. Helms), I do not think § 10(a) is severable from § 10(b). The "relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis in original). If we were to strike down § 10(b) and leave §10(a), cable operators would be left with discretion whether to "inflict[ ] their unsuspecting subscribers with sexually explicit programs," flatly contradicting the stated purpose of the provisions.

[8] The majority also rejects petitioners' alternative argument, that because leased and public access channels are a "public forum" for purposes of First Amendment analysis, the government may not authorize private parties to censor speech there. It is a close question. While the legislative history of the 1984 Cable Act uses the term "public forum" in describing leased and public access channels, admittedly there is no clear indication that Congress was using that term in its technical First Amendment sense, classifying cable access channels with such traditional public fora as parks and streets. However, I disagree with the majority's suggestion that a public forum can *never* exist on private property. *See* Maj. op. at 28-31. In some circumstances private property dedicated to public uses could become a limited public forum, through some

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II. Sections 10(a) and (b) Cause A Deprivation of First Amendment Speech Rights

The majority relies on the untenable notion that requiring adults to separately request "indecent" leased access programming in writing, wait up to 30 days to receive such service, and possibly be required to pay extra for it, poses no burden whatsoever on the speech rights of either the speakers or receivers of such speech. *See* Maj. op. at 37-38. This does not square with reality. If the government imposed similar restrictions on other categories of speech, such as speech concerning nuclear power or criticism of government officials, and required that citizens could receive it only after separately requesting it in writing and then waiting up to 30 days to receive it, we would almost surely say that the speech rights of both speakers and listeners were unduly burdened. In *Lamont v. Postmaster General*, 381 U.S. 301 (1965), the Supreme Court struck down a statute providing that the Post Office deliver "communist propaganda" only upon written request in advance from the recipient. The Court ruled "on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered," *id.* at 307, and thus the recipient "carries an affirmative obligation which we do not think the Government may

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[8](...continued)

combination of legally binding use restrictions and an established tradition of use for speech purposes. A land swap, zoning approval, or building permits, for example, might be made conditional on a private property owner's agreement to permanently set aside part of his property for public access and use, including traditional First Amendment speech activities, either to substitute for or to supplement "traditional" public fora like parks and streets. Such use restrictions, perhaps in combination with a tradition of actual use for such speech purposes, might create a public forum. Similarly, Congress might create a public forum by insisting that privately owned communications media dedicate a portion of their capacity to unrestricted public access for speech purposes. Nonetheless, I would not reach the question of whether Congress created a public forum in this case because I find state action present in the statutory scheme itself.

impose on him." *Id.*[9] Advance notice and registration requirements "drastically burden free speech" because they "stifle" the spontaneity and immediacy of expressive activities and "chill[ ] . . . the exercise of first amendment rights." *Rosen v. Port of Portland*, 641 F.2d 1243, 1249 (9th Cir.1981) (striking down requirement that speakers wishing to exercise First Amendment rights in port facilities must register in writing at least one business day in advance). Our concern in such cases is that, by singling out a disfavored class of speech and requiring that audiences take special, affirmative steps to receive it, the government effectively blocks many potential listeners from hearing it, and impairs many speakers from providing it. These results are "at war with the 'uninhibited, robust, and wide-open' debate and discussion that are

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[9] Attempting to distinguish *Lamont*, the majority misstates the "narrow ground" upon which the Supreme Court relied. *See* Maj. op. at 38 n.23. The passage more fully reads:

> We rest on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights. The addressee carries an affirmative obligation which we do not think the Government may impose on him.

Lamont, 381 U.S. at 307. The Court then discussed the requirement's "deterrent effect," noting that some vulnerable government employees would fear for their livelihoods if they requested forbidden literature. But "[a]part from them, *any* addressee is likely to feel some inhibition in sending for literature which federal officials have condemned as 'communist political propaganda.'" *Id.* (emphasis added). *Lamont*, then, says such requirements burden speech in two ways: first by placing an "affirmative obligation" on the recipient, and second by branding the speech with government disapproval. *See also id.* at 309 (Brennan, J., concurring) (rejecting government's argument that the requirement is "only inconvenience and not an abridgement," because "inhibition as well as prohibition against the exercise of precious First Amendment rights is a power denied to government").

contemplated by the First Amendment." *Lamont*, 381 U.S. at 307 (citation omitted).

In the first place, such disparate treatment clearly implies governmental disapproval of the speech in question, and it is beyond cavil that some stigma attaches to a written request to receive it. *Cf. Lamont*, 381 U.S. at 307 (placing affirmative duty on recipient of content-defined speech "is almost certain to have a deterrent effect" because the recipient "is likely to feel some inhibition in sending for literature which government officials have condemned . . . ."); *Rosen*, 641 F.2d at 1251 ("Identification requirements impose heavy burdens on the exercise of first amendment rights" because stigma and fear of reprisals will deter many from engaging in disfavored speech activities.).

More importantly, as the majority itself implicitly recognizes, only those who identify themselves as having a compelling interest in receiving the segregated category of speech are likely to take the special affirmative steps necessary to receive it. *See* Maj. op. at 37-38. Others with a milder level of interest or a lesser commitment to challenging the government's disapproval may lack the boldness to step forward and request it, or the initiative to take the affirmative steps necessary to gain access to the sealed-off information. Some may never even become aware that the speech may be received upon special request. Almost certainly fewer people will ultimately hear such speech. And under the new economic realities of a diminished market for their product as a result of governmental intervention, potential producers of such controversial speech will be disinclined to create it. Thus can government-imposed access barriers effectively squelch constitutionally-protected speech.

Yet the majority insists that so long as those who want access to a content-based class of speech *ultimately* may receive it, the government may, without constitutional consequence, freely place obstacles in the way of their receiving it. As a general proposition, this is surely inconsistent with our constitutional traditions of free speech and the unimpeded flow of ideas. We would not so easily tolerate such direct governmental interference with other categories of speech. *Cf. Lamont*, 381 U.S. at 307; *Rosen*, 641 F.2d at 1252.

One suspects that, *sub silentio*, the majority is leaning on a judgment that "indecent" speech is entitled to such a lesser degree of protection than other constitutionally-protected categories of speech that the same rigorous standards of constitutional testing do not apply.

Finally, the majority's arguments are fundamentally inconsistent with the realities of television viewing. The market for "indecent" speech does not break down neatly, as the majority suggests, into self-identified groups of those who want indecent speech in their homes, and those who do not. *See* Maj. op. at 38. Many viewers fall somewhere in between. They may not want a steady stream of "indecent" speech, and probably do not want to be perceived (even by their cable operator, much less anyone who might later acquire such information by subpoena or otherwise) as the kind of people who do. They therefore will not affirmatively write for access to the "indecent" channel even if they become aware of it. Yet given a free choice in the matter, they might prefer to have unimpeded, selective access to some but not all programs that fall within that broad umbrella designation. Not only *aficionados* of the arts or of politics but also the mildly curious might well decide to watch an "unvarnished" documentary on the Mapplethorpe exhibit if it is readily available, for example, but may not write to request an entire channel of indecency on the chance that this and similar programs will be included. They may want to shield their children from most "indecent" programming, yet may occasionally find it appropriate to expose older children to frank, even graphic discussions of sexuality and the AIDS epidemic, including some programs that might fall within the FCC's definition of "indecency" (or at any rate are close enough to the line that cable operators will ban them altogether or relegate them to the "indecent" channel). Whether they are "channel surfers" who like to browse before settling on a program, or "appointment viewers" who prefer to study a program guide and watch pre-selected programs, this regulation makes it substantially *more* difficult for cable subscribers to selectively control the content of their viewing on a program-by-program basis. It thus places a substantial burden on their speech rights as adult television viewers, while adding nothing

to their ability to exercise *selective* control over their children's viewing. "At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2458 (1994). So too, when it comes to umpiring the "decency" of the communications permitted into our homes, the government's role should be restricted to one which supports not replaces society's primary institution for moral education — the family.

III. Sections 10(a) and (b) Do Not Meet the "Least Restrictive Means" Test

A. *What Does the Test Require?*

"Content-based regulations [of speech] are presumptively invalid," *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992), and are "subject . . . to the most exacting scrutiny," *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (quotation and citation omitted). The Supreme Court has reiterated many times that a content-based regulation of speech must be "the least restrictive means" to achieve a compelling governmental interest. *Sable*, 492 U.S. at 126. "It is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.* To survive strict scrutiny, then, a content-based regulation must be "precisely drawn" to serve a compelling state interest. *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980).

Supreme Court precedent certainly rejects the notion that a content-based regulation of speech will survive regardless of the burden on speech simply because it is the most effective means to achieve a compelling state interest. Quite the opposite. In *Sable*, for example, the government argued that a *total* ban on telephone transmission of indecent speech was the *most* effective, indeed the *only* fully effective way to achieve the government's compelling objective of protecting children. 492 U.S. at 128. Yet the Supreme Court decisively rejected that argument, conceding that

means other than a total ban might be *less* effective.[10] The Court said that a flat ban on indecent speech was not "the least restrictive means to further the articulated interest," *id.* at 126, because its "denial of adult access to telephone messages which are indecent but not obscene far exceeds that which is necessary to limit the access of minors to such messages," *id.* at 131, and thus the challenged regulation was not sufficiently "carefully tailored." *Id.* at 126. As *Sable* demonstrates, a regulation can be the *most* effective means of achieving a compelling interest and still run afoul of the First Amendment if it burdens substantial amounts of protected speech beyond what would be reasonably effective in serving the compelling interest. Here, too, as in *Sable*, the precision demanded of a content-based regulation is decidedly missing.

B. *What Are the Compelling Interests?*

1. *Protecting Children*

The government asserts a compelling interest in "shielding minors from the harmful effects of indecent programming" entering their homes on cable television. Government Brief at 37. *See also Sable*, 492 U.S. at 126 (government has a compelling interest in "protecting the physical and psychological well-being of minors" which "extends to shielding minors from the influence of literature that is not obscene by adult standards"); *FCC v. Pacifica Foundation*, 438 U.S. 726, 749 (1978). The exact nature of that interest, however, is left unclear in both the government's brief and the majority's opinion. The majority argues somewhat inconsistently that the statute and regulations are aimed at assisting

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[10] The Court said that while technological means of protecting children from indecent telephone messages might not be "fail-safe" or "foolproof," 492 U.S. at 130 & n.10, nonetheless there was nothing in the record to establish that they would not be "extremely effective." *Id.* at 130. Thus while the Court required that such alternative, less restrictive means be "effective," it did not require that they be shown to be equally as effective as a total ban.

parents in protecting children from indecent speech; and that because parents are not doing an adequate job of supervising their offsprings' viewing, the government must do it for them by keeping indecent programs out of reach. *See* Maj. op. at 39 (citing both rationales but treating them as one). While not inescapably irreconcilable, these goals are often in tension.

If the justification for the ban-or-block scheme is that it will assist parents in monitoring their children's viewing, § 10 is certainly not precisely crafted to do that job. Rather than enhance parental control, it merely deprives all adults as well as children of *any* choice if their cable operator exercises regulatory option (a) and bans indecent programming. Alternatively, if the cable operator does not ban indecent programming altogether, adult viewers are left with a single blanket choice under § 10(b), whether to affirmatively invite the complete repertoire of the "indecent" channel into their home (and perhaps to pay for it). They may either keep *all* indecent leased access speech out of their homes, or let *all* indecent programming in, thereby providing their children with unimpeded access to such programming.[11] Of what help to parents is that?

In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Supreme Court struck down a statute prohibiting advertisers from mailing unsolicited advertisements for contraceptives to home addresses, on grounds that the ban was not precisely drawn to achieve the government's interest. Although the government argued the statute was designed to "aid[ ] parents' efforts to discuss birth control with their children," the Court said the statute "provides only the most limited incremental support for the interest asserted." *Id.* at 73. While broadly burdening *all* adults by making it more difficult for them to gain access to a constitutionally-protected category of speech, the statute aided only one narrow class of

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[11] Parents who elect to receive indecent programming can still use "lockboxes" to lock out selected channels, of course. But in that case, it is the lockbox and not the § 10(b) blocking scheme that is doing all the useful work in shielding children from indecent programming. *See infra* Part III.C.

parents, those "who desire to keep their children from confronting such mailings, [but] who are otherwise unable to do so." *Id.* The *Bolger* case is remarkably similar to ours. The statute and regulations here broadly burden all adults, while assisting only the much narrower class of parents who desire to shield their children from all indecent programming but for whatever reason — absence, fatigue, or unwillingness to work it out — feel unable to do so.

As to the government's second prong, a purist interest in protecting children, regardless of their parents' desires — a justification about which we have grave doubts — the government has notably failed to build any record that parental control of children's television viewing is not reliable by itself and must be supplemented or even overridden by a government censor. Congress and the FCC have in the past relied principally as a justification for regulating indecent cable programming on the need to aid parental supervision and guidance. *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984). Governmental restrictions directly interfering with parents' rights to control the information their children receive are regarded with suspicion "regardless of the strength of the governmental interest." *See Bolger*, 463 U.S. at 75. In particular, as demonstrated *infra* in Part III.C., there is no record in the agency here demonstrating that measures currently available such as lockbox technology have been markedly ineffective in shielding children from access to indecent leased access programming. On the other hand, the government has not established that the ban-or-block requirement is sufficiently precise not to overshoot its objective. Adults who desire access to any indecent speech on leased access channels will be entirely deprived or required to specifically request in writing access to an entire channel of it 30 days in advance. If parents choose to request such programming, their children, of course, will also be exposed to it. In fact, the regulation does next to nothing to decouple children's access to indecent programming from adults' access, or to protect children whose parents purposefully bring indecent programming into the home.

To the extent §§ 10(a) and (b) "protect" children at all, they do so by relying on cable operators to ban indecent speech entirely; or

on parental inaction in not subscribing to the segregated channel. The degree to which children are protected is directly tied to the degree to which adult access is curtailed, contrary to the well-established principle enunciated in *Butler v. Michigan* that statutes designed to protect children may not "reduce the adult population . . . to . . . only what is fit for children," 352 U.S. 380, 383 (1957), and in *Bolger*, that "[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox." 463 U.S. at 74.

In this crucial respect, the provisions at issue here differ from the FCC's regulations on indecent telephone communications,[12] which allow adults to retain instantaneous and relatively effortless access to such speech through means such as credit cards, access codes, and consumer-controlled descrambling devices, thereby

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[12] Senator Helms argued on the Senate floor that the § 10(b) segregation-and-blocking requirement "is precisely the same method that Congress used to block dial-a-porn lines," a method which the courts had "validated." 138 CONG. REC. S646 (daily ed., Jan. 30, 1992). The Commission similarly argued that "[t]he blocking scheme upheld in these [telephone] cases is, in all relevant respects, identical to that required by section 10(b)." 8 F.C.C.R. at 1000 ¶ 13. These comparisons, however, are highly inaccurate. As the Ninth Circuit observed in *Information Providers' Coalition v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991), the telephone "reverse blocking" scheme, under which telephone companies block all access to providers of indecent speech unless consumers specifically request it in writing, is just one of several alternative access methods permitted under the telephone regulations, and is required only if the message provider elects to bill through the telephone carrier. If the message provider bills directly, it may rely instead on credit cards, access codes, or consumer-controlled descrambling devices to screen out children's access, while allowing adults virtually unimpeded, instantaneous access. Thus in considering whether telephone blocking is the least restrictive means, the court emphasized, "it is critical that the [blocking] system not be considered *in vacuo*" but instead must be seen as part of a "multi-tiered" regulatory scheme which affords both speakers and adult listeners numerous alternative, less burdensome avenues of communication. *Id.*

effectively decoupling children's access from that of adults. *See Information Providers' Coalition v. FCC*, 928 F.2d 866, 872 (9th Cir. 1991); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 557 (2d Cir.) (analogizing these approaches to requirements that sexually oriented magazines be kept under opaque covers or in separate adults-only sections of bookstores; "[i]n each case adults continue to have access to the materials, with minimal inconvenience, while minors' access is restricted"), *cert. denied*, 488 U.S. 924 (1988). *See also Enforcement of Prohibitions on the Use of Common Carriers for the Transmission of Obscene Materials*, 2 F.C.C.R. 2714, 2719 ¶ 32 (1987) (Commission's objective in designing telephone indecency regulations was "to select the option effectively restricting access to the communications in question *to adults* which is the least intrusive upon protected forms of expression") (emphasis added). By foreclosing children's access in a reasonably effective manner and only minimally burdening adults' access, the telephone regulations achieve the precision of regulation required by First Amendment jurisprudence. No such precision was attempted in these cable regulations.

2. *"Uninvited Intruder"*

The majority posits an additional governmental interest: protecting citizens from the uninvited "intruder" of indecent programming.[13] Maj. op. at 33- 34. In the *Pacifica* case, the

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[13] The government argues in a footnote to its brief that this is a "legitimate" governmental interest, but nowhere does it suggest that it rises to the level of a "compelling" interest. *See* Government Brief at 37, n.16. Since only a *compelling* governmental interest can sustain a content-based restriction of speech, the government must be deemed to have waived the argument that this justification is sufficient to support the challenged statute and regulation, although the argument had been advanced at the agency level, *see* 8 F.C.C.R. 999-1000, and on the Senate floor, *see* 138 CONG. REC. S648 (daily ed., Jan. 30, 1992) (remarks of Sen. Thurmond). I address the question here, however, in response to the majority's reliance on this rationale.

Supreme Court noted that indecent broadcasts "confront[ ] the citizen . . . in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748. But whether this rationale could pass the compelling interest test in the broadcast arena, it cannot qualify in the cable context. The FCC itself takes the position that although cable television too enters the home, it comes as an *invited* guest. *First Report and Order*, 8 F.C.C.R. at 1001 ¶ 17 ("Cable television . . . may well be viewed as an invitee into an individual's home"). *See also Cruz v. Ferre*, 755 F.2d 1415, 1420 (11th Cir.1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164, 1167-69 (D. Utah 1982). Subscribers not only consent to, but must affirmatively request cable service. Like magazine subscribers, cable subscribers pay for the service and are free to cancel their subscription at any time if they do not like the programming they receive. Cable television service is indeed popular,[14] but its widespread dissemination does not transform it from an invitee to an intruder. *Compare Pacifica*, 438 U.S. at 748-50 (emphasizing narrowness of holding based on "uniquely pervasive" nature of broadcasts over public airwaves), *with Bolger*, 463 U.S. at 74 (declining to extend *Pacifica* rationale to mailed advertisements even though mail service is universal).

The government could conceivably have an interest in helping consumers "tailor their invitation" to cover only the cable programming they want. But at least with regard to *adults*, that

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[14] The majority correctly points out that more than 60% of all households with televisions subscribe to cable. The majority then adds that "[m]ost cable subscribers do not or cannot use antennas to receive broadcast services," perhaps inadvertently leaving the mistaken impression that without cable, most current subscribers would be left with no television at all. In fact, the quoted passage merely indicates that *while subscribing to cable*, most households do not *simultaneously* receive over-the-air broadcasts. *See* H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 57 (1992). Although some consumers are in areas without broadcast service, many (probably most) of these households could and would receive television broadcasts if they terminated cable service.

interest surely cannot be a compelling one. In *Bolger*, the Supreme Court said that the state's interest in "shield[ing] recipients of mail from materials that they are likely to find offensive" "carries little weight" because "[a]t least where obscenity is not involved . . . the fact that protected speech may be offensive to some does not justify its suppression." *Bolger*, 463 U.S. at 71 (citation and quotation omitted). The First Amendment "does not permit the government to prohibit speech as intrusive unless the 'captive' audience *cannot avoid* objectionable speech." *Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541-42 (1980) (emphasis added). As the FCC has repeatedly acknowledged, those adults who object to indecent speech on leased access channels may easily avoid such speech either by cancelling their cable subscriptions and relying on broadcast television as an alternative, or by blocking indecent programs or offensive channels through voluntary lockboxes. *See Broadcast Indecency*, 67 Rad. Reg.2d 1714, 1726 ¶ 62 (1990) (need to regulate indecency is far greater for broadcast than for cable because lockboxes give households control over cable programming entering the home); *Notice of Inquiry*, 4 F.C.C.R. 8358, 8364 ¶¶ 50-51 (1989) (suggesting regulation of broadcast indecency is justified in part by availability of cable as an "alternative" means of adult access to indecent programming where *Pacifica*-type concerns are not implicated due to availability of lockboxes to control access). The "intrusiveness" rationale cannot sustain the challenged provisions.[15]

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[15] In *Pacifica*, the Supreme Court rejected the argument that an individual offended by indecent broadcasts might simply turn off her set, which the Court analogized to "saying that the remedy for an assault is to run away after the first blow." 438 U.S. at 748-49. In the cable context, however, the options of not subscribing or locking out offensive channels are *in addition* to the option of turning off the set. No similar options are available for broadcast media.

C. *Do Sections 10(a) and (b) Meet the Least Restrictive Means Test?*

The government has the burden of showing that the means adopted to achieve the compelling governmental interest are the "least restrictive." *See Sable*, 492 U.S. at 126; *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 74 (1981); *Carlin Communications*, 837 F.2d at 555 ("The Government bears the heavy burden of demonstrating that the compelling state interest could not be served by restrictions that are less intrusive on protected forms of expression.") (citation and quotation omitted).

As petitioners point out, however, nothing in the record establishes that cable lockboxes — which cable operators are required to provide[16] — are not an effective means of protecting children from "indecent" programming. Indeed, the record strongly suggests otherwise, and even the majority apparently concedes the effectiveness of lockboxes, Maj. op. at 38 n.22. Congress has found lockboxes to be "effective." *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984) (describing lockboxes as a "means to effectively restrict the availability of such [indecent] programming, particularly with respect to child viewers, without restricting the First Amendment rights of the cable operator, the cable programmer, or other cable viewers"). The Commission on several occasions has attested to their efficacy. *See, e.g.*, FCC 85-179, 1985 FCC Lexis 3475, ¶ 132, at *112-13 ("Indeed, we believe that the provision for lockboxes largely disposes of issues involving the Commission's standards for indecency . . . ."); *id.* at

[16] The 1984 Cable Act requires each cable operator to "provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. § 544(d)(2)(A). These in-home devices, known as "lockboxes" or "parental keys," allow subscribers at their own discretion to block reception of any channels they do not wish to receive, either indefinitely or for shorter periods of time. Lockboxes thus allow parents to restrict their children's access to selected channels "whether or not parents are physically present and actively supervise." FCC 90-264, 5 F.C.C.R. 5297, 5305 (1990).

¶ 139, *115 (deleting a previous FCC rule barring cable operators from transmitting indecent origination programming, because the rule had become "duplicative of and indeed surpassed by" the lockbox requirement and other provisions of the 1984 Act under which "the public will continue to be protected from obscene and indecent programming"); FCC 90-264, 5 F.C.C.R. 5297, 5305 (1990) ("Technical means are available to block children's access to indecent cable programs. . . . [Lockboxes] can restrict access by children whether or not parents are physically present and actually supervise."). Not only cable programmers, but cable operators submitted comments during this rulemaking stating that lockboxes are effective. *See* J.A. 94 (programmers); J.A. 250, 253 (operators).

Because the 1992 Cable Act indecency provisions were adopted in a series of floor amendments, without benefit of committee hearings or even substantial floor debate, their legislative history is exceedingly scant. But nowhere in that meager history is there a single comment that anyone in Congress thought cable lockboxes ineffective. *See* 138 CONG. REC. S646 *et seq.* (daily ed., Jan. 30, 1992) (no mention of lockboxes in Senate floor debate); H.R. CONF. REP. NO. 862, 102d Cong., 2d Sess. 80 (1992) (no mention of lockboxes in conference report describing section 10).[17] Nor did the Commission add any significant findings of its own with respect to the effectiveness of cable lockboxes during this

[17] Senator Helms did erroneously attribute to the Supreme Court the view that "mandatory blocking" in general "is constitutional and far more effective than voluntary blocking," 138 CONG. REC. S647 (daily ed., Jan. 30, 1992). In fact, the opinion he cited, *Dial Info. Serv. Corp. v. Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992), was authored by a panel of the Second Circuit, and its conclusions reached only the telephone technology involved in the case before it. In any event, Senator Helms's conclusory approbation of that court's decision cannot be taken to represent a considered judgment by Congress concerning the effectiveness of cable lockbox technology. *Cf. Sable*, 492 U.S. at 129-30 (conclusory statements in floor debate unsupported by legislative findings or indications of considered legislative judgment not entitled to great weight).

rulemaking. *See First Report and Order*, 8 F.C.C.R. at 1000 (stating in conclusory fashion, without specific findings, that "[w]e agree with Congress' conclusion that the voluntary lockbox approach is not likely to be as effective as cable operator-blocked channels").

The government nonetheless leans heavily on the analogy to telephone technology, suggesting that "voluntary blocking" techniques are ineffective as a means of shielding children from indecent speech. The FCC, however, promulgated its telephone indecency regulations based upon extensive and detailed findings that voluntary blocking was not effective *in the context of telephone technology*. *See Regulations Concerning Indecent Communications by Telephone*, 5 F.C.C.R. 4926 (1990). The Commission did not conclude that voluntary blocking was in principle unworkable across all technologies; nor did it reach any conclusions whatsoever about cable technology. Instead, the findings were based entirely on considerations specific to telephone technology. That technology is fundamentally different from cable.

First, the Commission found that in the telephone context voluntary blocking was ineffective because telephone companies were able to block only *local* dial- a-porn providers, and for technological reasons were incapable of blocking *long-distance* access to dial-a-porn services. *Id.* at ¶ 16 (telephone blocking technology works by recognizing first three digits of seven-digit local phone number, and blocking three-digit sequences assigned to dial-a-porn services); *see also Information Providers' Coalition*, 928 F.2d at 873. Consequently, voluntary telephone blocking does not prevent minors from accessing dial-a-porn services by long distance calls. That concern is inapplicable in the cable television context, because lockboxes can block *any* channel received in the home.

Second, the Commission found that voluntary telephone blocking was ineffective because telephones, including pay phones, are ubiquitous and readily accessible to children outside the home. 5 F.C.C.R. 4926 at ¶ 16. Although cable television is widely available, it is not nearly as accessible to unsupervised children outside the home as is telephone service. Pay phones in particular provide individual, unsupervised, private access to indecent

communications on street corners and in shopping malls, movie theaters, restaurants, gas stations, parks, and playgrounds.

Third, the Commission found that voluntary blocking was ineffective in the telephone context because many parents were not even aware that dial-a-porn services existed, much less that voluntary blocking technology was available. *Id.* at ¶¶ 18, 20; *see also Dial Info. Serv.*, 938 F.2d at 1542 (half of residential households in New York were unaware of either dial-a-porn services or blocking technology). The level of parental awareness of indecent programming and lockbox technology is far greater in the cable context. Unlike telephone subscribers with access to literally millions of telephone numbers, cable subscribers typically receive only a few dozen channels, and parents would have to be hermits to be unaware through newspapers and even television itself of the debate over sex and violence on the tube. Parental unawareness of indecent cable programming at the level of telephone porn has not been established anywhere in the agency record. The Commission's convincing showing that telephone blocking technology was ineffective at shielding minors has no parallel in this case.

The majority accepts — too readily, I think — the government's contention that because the operator can establish no central editorial control on leased access channels, indecent speech comes into the home more "intermittently and randomly" on leased than on regular channels, thereby defeating the effectiveness of lockbox technology. *See* Maj. op. at 34-36. Because indecent programming can appear on leased access channels at any time, the FCC says, parents must either lock out leased access channels altogether (thus depriving adults in the household of *all* leased access speech), or monitor leased access channels continually, locking and unlocking the control boxes, risking "a slip up or a lapse" that exposes their children to indecent programming. Maj. op. at 35. Less drastic alternatives, however, immediately come to mind. *Segregating* indecent leased access programming, either by channel or by time (*i.e.*, a reasonable "safe harbor" period), would actively facilitate parental control because parents could use *lockbox* technology more effectively, knowing which channels to lock out, and at which

times, to protect their children. Neither Congress nor the FCC has considered whether segregation of indecent leased access programming, when combined with existing lockbox technology, might be an effective yet far less restrictive means of achieving the statute's purported goals than the § 10 ban-or-block scheme.

The majority also suggests that the cost of lockboxes may deter some parents from acquiring and using them. Maj. op. at 38. But again, if this is a real impediment (and there is no record support to show it is), less restrictive means than a ban-or-block scheme are at hand. Cost-spreading — raising everyone's costs the small amount it would take to provide free lockboxes to all takers — would make lockboxes readily available. In fact, many cable operators have already converted to "addressable" systems that incorporate lockbox technology into the cable box that every subscriber receives. *See* J.A. 316-17. These addressable systems accomplish both cost-spreading and universal availability of lockbox technology. Neither Congress nor the FCC considered this new advance in technology.

Finally, neither Congress, the FCC, nor the majority has taken account of where the cost burden of the segregate-and-block scheme will fall, and with what implications for free speech. There are only a few prospects: the cable operators, producers of "indecent" speech, leased access programmers generally, subscribers to "indecent" speech, or subscribers generally. The majority concedes that if the cost is borne by cable operators, it could create sufficient incentives for operators to ban (rather than block) indecent programming so as to implicate state action, and therefore to invalidate § 10(a) as an indirect form of state censorship. *See* Maj. op. at 24. But the majority never considers that if the cost of segregation-and-blocking is placed entirely on programmers of "indecent" speech — or on those who wish to receive such speech — the regulation will place a direct and heavy burden on a content-defined class of constitutionally protected speech. Whether that burden would be so great as to actually deter such speech, we cannot say; nothing in the record warrants a conclusion either way. But if the burden is on the *government* to show that its

content-based regulation is the least restrictive means, it must face and explain away those potential problems.

IV. State Action is Indeed in Section 10(c) and It Does Not Meet the "Least Restrictive Means" Test

A. *Does State Action Inhere in Section 10(c)?*

State action also inheres in the statutory scheme of § 10(c). In the 1984 Cable Act, Congress authorized local franchising authorities to require cable operators to set aside channels for noncommercial public, educational, and governmental use ("PEG access"), 47 U.S.C. § 531(b), and forbade cable operators from exercising any editorial control over programming on those channels, 47 U.S.C. § 531(e).[18] Then, in § 10(c) of the 1992 Cable Act, Congress changed the rules with regard to a content-defined category of speech, authorizing cable operators "to prohibit the use [of PEG channels] for any programming which contains . . . sexually explicit conduct," Pub.L. No. 102-385, § 10(c), 106 Stat. at 1486, which the FCC has interpreted to mean "indecent" programming, *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993).

Quite plainly, the revised statutory scheme is on its face a content-based regulation of protected speech. "As a general rule, laws that by their terms distinguish favored speech from disfavored speech on the basis of their . . . [content] are content-based." *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994). Under the statute, cable operators and programmers are subject to two fundamentally different statutorily-assigned schemes of substantive and procedural rights, duties, and burdens with respect to PEG programming. Which of those schemes applies

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[18] Section 531(e) contains an exception, however: cable operators may under certain circumstances ban programming that is "obscene or . . . otherwise unprotected by the Constitution of the United States." 47 U.S.C. § 544(d)(1).

depends solely on whether the content of the programming meets the government's definition of "indecent." *Cf. id.* at 2459 ("Our precedents . . . apply the most exacting scrutiny to regulations that suppress, disadvantage, or *impose differential burdens* upon speech because of its content.") (emphasis added); *id.* at 2460 (must-carry rules are not content-based because they "impose burdens and confer benefits [on cable operators and broadcasters] without reference to the content of speech" and "interfere with with cable operators' editorial discretion" even-handedly, so that "the extent of the interference does not depend on the content of the . . . programming"). The result is that under the government's scheme of differential regulation, indecent speech — as defined by the government — alone is subject to banning by cable operators.[19] To borrow language from the original panel opinion, "the government first strips a cable operator of editorial power over access channels, then singles out material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only." *Alliance for Community Media v. FCC*, 10 F.3d 812, 821 (D.C.Cir.1993), *vacated*, 15 F.3d 186 (1994).

What reason could Congress possibly have for assigning operators and programmers different rights, duties, and procedures on the basis of such a governmentally-defined content distinction? The only answer is that the government disfavors "indecent" speech, and seeks through this differential regulation to limit speech

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[19] Although our emphasis is properly on the statutory scheme of § 10(c) itself, which petitioners challenge here, it is also clear that the nature of the cable operator's decision to ban indecent programming under § 10(c) is of an entirely different character from the exercise of professional medical judgment at issue in *Blum v. Yaretsky*. As the *Blum* Court explained, those medical judgments were made "according to professional standards that are not established by the State," 457 U.S. at 1008. In contrast, the statute here *forbids* the cable operator from exercising, with respect to leased access programming, broad editorial discretion "according to professional standards . . . not established by the State." Instead it specifically authorizes a single, highly constrained decision — whether or not to ban material classified as "indecent" under a government-imposed definition.

in that disfavored category — a purpose the government does not disavow. This purpose has nothing to do with restoring genuine "editorial control" to cable operators. The majority's attempt to characterize § 10(c) as a return of "editorial control" sunders the provision from the context of its enactment as part of a broader measure seeking to suppress indecent speech, as well as from its statutory moorings as a singular, content-based exception to an otherwise flat prohibition on the exercise of private judgment. Surely if Congress adopted this kind of selective approach to other content-defined categories of speech — for example, authorizing cable operators to ban programs discussing military spending but no other category — the aim of the government's scheme of dual regulation, suppressing the disfavored speech, would be transparent.[20]

We thus have a congressionally-enacted statute that both facially discriminates on the basis of the content of speech, and has a "manifest purpose" to "burden . . . speech of a particular content," *Turner Broadcasting*, 114 S. Ct. at 2461 (*either* facial content-based discrimination *or* "manifest purpose" to benefit or burden speech on the basis of content is sufficient to make the statute content-based, triggering strict scrutiny). With rare exceptions, "'[r]egulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment," *Simon & Schuster v. New York Crime Victims Bd.*,

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[20] The "impetus" for the suppression of disfavored speech thus clearly comes in the first instance from the state, and not a private actor. *Cf. Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 172-73 (1972) (when "impetus" for discrimination comes from a private party, state must have "significantly involved itself" to establish state action); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 356-57 (1974) (state's passive acquiesence in shutoff policy initiated by regulated utility does not implicate state action; the utility's "exercise of the choice allowed it by state law where the initiative comes from it and not from the State, does not make its action . . . 'state action' . . . ."). *Moose Lodge and Jackson* implicitly suggest that when the "impetus" or "initiative" for the deprivation comes from the state — as here, through enactment of § 10(c) — state action is more likely present.

502 U.S. 105, 116 (1991) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)).

When the § 10(c) statutory scheme works as intended, and cable programmers and adult audiences are deprived of opportunities to communicate and receive indecent speech, that deprivation is "caused by the exercise of some right or privilege created by the State," *Lugar*, 457 U.S. at 937, namely the cable operator's narrow statutory authorization to ban indecent speech (and only indecent speech). And Congress and the FCC, the "part[ies] charged with the deprivation," "may fairly be said to be . . . state actor[s]." *Id.* Because the dual requirements of *Lugar* are met, the deprivation is "fairly attributable" to the government, *id.*, and state action is present.

As the *Lugar* Court explained, "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power," and "avoids imposing on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Id.* at 936. Here, a determination that state action is present does not intrude into an "area of individual freedom" — no such sphere was left after Congress denied cable operators control over the content of PEG programming in the 1984 Act, and it is patently obvious that through § 10(c) Congress has not foreshortened but rather extended the "reach of federal law" by creating a narrow, governmentally-structured choice whether to ban a single governmentally-defined category of speech. Where federal law reaches, constitutional scrutiny must follow. Nor is it unfair to attribute to the government the intended and wholly foreseeable consequence of its statute, the suppression of indecent speech. Indeed, under these circumstances it would be grossly unfair and contrary to the principles underlying the state action doctrine to allow the government to evade constitutional responsibility for its own conduct, simply because it has set up a private party as the triggerman in its carefully crafted scheme.

B. *Does § 10(c) Meet the Least Restrictive Means Test?*

Section 10(c), which authorizes cable operators to ban indecent speech on PEG channels, is fatally flawed because the government has failed to show that the regulation will make any significant contribution toward furthering the government's asserted interest in protecting children from indecent television programming, much less that it is the "least restrictive means" to achieve that purpose. *Cf. Sable*, 492 U.S. at 126 (the means chosen must "further the articulated interest"). Where § 10(c) achieves its intended effect, the result will be a total ban on indecent speech, and therefore a total deprivation of programmers' and adult audiences' rights to communicate and receive such speech. We do not know from the agency record, however, whether the regulation will "protect" one percent, twenty percent, fifty percent, or one hundred percent of the nation's children. Indeed, that is left to the standardless discretion of cable operators. What we do know is that § 10(c), like §§ 10(a) and (b), will be of no use in helping *parents* supervise their children's viewing; the decision is taken out of their hands, and placed in the hands of their cable operator.

In addition, just as with the §§ 10(a) and (b) ban-or-block scheme, § 10(c) shields children from indecent programming only by simultaneously depriving programmers and adult viewers of their speech rights, without attempting to decouple children's access from that of adults. Consequently, to the extent § 10(c) has any effect in shielding children from indecent programming, it also impermissibly "reduce[s] the adult population . . . to . . . only what is fit for children." *Butler v. Michigan*, 352 U.S. at 383. I would conclude that the government has not shown that the § 10(c) permissive ban scheme is the "least restrictive means" to achieve a compelling governmental interest.

V. Conclusion

Because Section 10 is state action restricting constitutionally-protected speech, and because the government has not met its constitutionally-imposed burden of showing on this record that these provisions are the least restrictive means necessary

to achieve the compelling governmental interest of protecting children in the context of the family unit, I respectfully dissent.

EDWARDS, *Chief Judge*, dissenting in part: I agree with the judgment reached by the dissent — that sections 10(a) and 10(b), together, constitute state action and do not provide the least restrictive means to further the Government's asserted interest in promoting the well-being of children. According to the Government, children face harm from exposure to "indecent" programming on leased access cable television, so it is contended that Congress may lawfully act to ban such programming. There is not one iota of evidence in the record, however, to support the claim that exposure to indecency is harmful — indeed, the nature of the alleged "harm" is never explained. This being the case, there is little doubt in my mind that the statute as presently written fails constitutional scrutiny.

I write separately because I do not entirely agree with the analysis underlying Judge Wald's dissent. Frankly, I think that Congress may properly pass a law to facilitate *parental supervision of their children, i.e.*, a law that simply segregates and blocks indecent programming and thereby helps parents control whether and to what extent their children are exposed to such programming. However, a law that effectively *bans* all indecent programming — as does the statute at issue in this case — does not facilitate parental supervision. In my view, my right as a parent has been preempted, not facilitated, if I am told that certain programming will be banned from my cable television. Congress cannot take away my right to decide what my children watch, absent some showing that my children are in fact at risk of harm from exposure to indecent programming. But Congress surely can, I think, act to help me implement the decisions that I make as a parent. However, this latter interest — facilitating parental supervision — has not been advanced by the Government in this case.

Because the foregoing propositions seem self-evident to me, I will refrain from an elaborate constitutional analysis of section 10's provisions. It is not so much the constitutionality of these provisions that I find perplexing, but rather the shortsightedness of Congress in enacting a scheme that does so little to deal with the ills of television. At bottom, I think this case is much ado about nothing much.

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I agree with the majority that section 10(c) does not constitute state action and, therefore, does not pose any constitutional problems. Section 10(c) merely directs the FCC to allow cable operators to prohibit the use of their PEG-access channels for programming which contains obscenity, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Cable operators' decisions to allow or prohibit such speech are their own; their action or inaction does not trigger any alternative regulatory regimes. In section 10(c), Congress merely returns some editorial control to cable operators, and this is not the least bit objectionable in my view.

Sections 10(a) and 10(b), however, constitute state action. These two provisions, read together, do not merely return some editorial control to cable operators, they tend to mandate a preferred result. Section 10(a) allows cable operators to ban indecent speech, and section 10(b) mandates that those cable operators who do not prohibit indecency must segregate and block the indecent programming. While the language of these two provisions contains a choice — indeed, the majority focuses on this "choice" — the choice is of little moment. Judge Wald's dissent is persuasive on this point.

If the statute did not contain section 10(b), I would agree with the majority that, section 10(a), itself, does not constitute state action, for the same reasons that section 10(c) is unobjectionable. Section 10(a), standing alone, merely directs the FCC to allow cable operators to prohibit indecent programming. But section 10(a) does not stand alone. Section 10(b) hinges on section 10(a): it speaks only to those who "have not voluntarily prohibited under subsection ([a])" and mandates that they segregate and block indecent programming.

In analyzing sections 10(a) and 10(b) separately, the majority effectively ducks the question of incentives. But I cannot comprehend how this issue can be avoided in any decision regarding the legality of the Act. If you are a cable operator interested in making money and you are faced with the virtually

cost-free option of banning indecency or the likely costly option of segregating and blocking indecent programming, which option would you choose? The answer seems easy. However, the majority declines to indulge the obvious, contending that "the Commission has yet to consider the matter" of whether the costs associated with segregating and blocking must be borne by the cable operator. The majority also finds that petitioners have not met their burden of proving that the costs of implementing section 10(b) would drive cable operators to ban indecent speech under section 10(a), a conclusion that seems a bit circular given that the Commission has not yet considered the matter. Nevertheless, the majority admits that "[t]he situation might well be different if the Commission were to adopt a policy that created a significant economic disincentive for operators to segregate and block indecent programming." I think that financially minded cable operators will have little doubt which option to choose. Because sections 10(a) and 10(b) are linked — indeed the costs associated with section 10(b) will prompt financially minded cable operators to choose section 10(a) — the majority's attempt to divide and conquer is not ultimately persuasive.

If the statute did not contain section 10(a), I might agree with the majority that section 10(b) passes constitutional muster. The Government claims that the statute is meant to protect children from the harmful effects of indecent programming. Had the Government offered some evidence of the harmful effects of indecent programming on children, I might find section 10(b), standing alone, constitutional. "When the Government defends a regulation on speech as a means to . . . prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2470 (1994) (plurality) (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C.Cir.1985)). The Government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* (citing *Edenfield v. Fane*, 113 S. Ct. 1792, 1798-99 (1993)). The Government has not offered one shred of evidence that indecent programming harms children.

The Government might have suggested that section 10(b)'s segregate-and-block scheme was meant to further a compelling interest in facilitating parental supervision of the cable programs their children watch. Indeed, in a case argued the same day as this one, the Government described its interest in promoting the well-being of children as encompassing both the interest in shielding children from indecency and facilitating parental supervision. *See* Brief for Respondents at 16-17, *Act v. FCC* (No. 93-1092). This second interest undoubtedly finds ample support in Supreme Court case law. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 639 (1968) (stating that "constitutional interpretation has consistently recognized that the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society"); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (striking state law requiring children to attend public schools as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking state law that prohibited teaching in foreign languages to children as interfering with "the power of parents to control the education of their own"). Contrary to Judge Wald's dissent, I do believe that a segregate-and-block scheme would facilitate parental supervision.

In fact, I might find that section 10(b), standing alone, is the least restrictive means of furthering the Government's interest in facilitating parental supervision of children. A segregate-and-block system can help parents monitor the programming their children watch. For those parents who want to keep all indecent programming out of the house, it provides an easy mechanism to do so. For those parents who wish to expose their children to the myriad of leased-access programming, section 10(b) allows them to subscribe to the segregated channels. For those parents who wish to do their own screening, it undoubtedly helps to know that all of the leased-access "indecent" programming is located on one channel. Those parents can control their children's viewing either by instructing them about what they may not watch or by using a lockbox or some such device which gives television owners control

over unwanted programs. As Judge Wald notes, the segregate-and-block methodology embraced by section 10(b) is a rather unsophisticated approach to achieve a goal of parental supervision: surely Congress has reason to know that there are more efficient technological devices available to segregate and block categories of programs and thereby facilitate parental choices of preferred programming. Despite the legislative failure to adopt more efficient alternatives, I would still find section 10(b) unobjectionable if it stood alone and if the Government justified it as a means to facilitate parental supervision. What I might think if the statute were written differently, however, does not help me deal with what is now before the court.

As I see it, sections 10(a) and 10(b) are connected parts of a whole, which work in tandem to produce an absolute *ban* on indecent speech. A ban does nothing to facilitate parents' supervision of their children, unless we assume that all parents' views are not only identical to each other, but also the same as the Government's. This assumption is preposterous, and the Constitution simply does not permit a flat ban of protected speech.

* * * * *

There is one other aspect of the majority opinion that I find troubling. In a somewhat obscure line of analysis, the majority intimates that *cable* should be subject to the same First Amendment protections as *broadcast*. To advance this point, the majority argues that "the constitutionality of indecency regulation in a given medium turns in part, on the medium's characteristics" and that "it is apparent that leased access programming has far more in common with radio broadcast in *Pacifica* than with the telephone communication in *Sable*." This simple equation is superficially appealing, but it does not produce the result suggested by the majority.

For many reasons that need not be addressed here, I surely agree with the majority that it makes no sense to treat broadcast and cable differently. It does not follow from this, however, that the First Amendment protections afforded to cable should be *reduced* to the level normally reserved for broadcast. *See FCC v. Pacifica*,

438 U.S. 726, 748 (1978) ("[O]f all forms of communication, it is broadcasting that has received the most limited First Amendment protection."). In fact, the Supreme Court recently decided this question and rejected the position seemingly advanced by the majority:

> We address . . . the . . . contention that regulation of cable television should be analyzed under the same First Amendment standard that applies to regulation of broadcast television. . . . [T]he rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.

Turner Broadcasting, 114 S. Ct. at 2456.

Content-based regulations of cable television programming must satisfy exacting First Amendment scrutiny. And a regulation premised on a claim that "indecent" programming causes harm to children must be justified by some evidence of the harm claimed.

POSTSCRIPT

This court has spent a great deal of its energy analyzing section 10: the court has now heard the case twice; and it has produced opinions of considerable length, analyzing a great deal of constitutional case law. And yet, I cannot help but wonder what Congress is doing. Why has Congress chosen to regulate "indecency" on leased-access and PEG-access channels, as opposed to all cable channels? Congress claims it is concerned with protecting children from the ills of televised indecency. Is there any viewing individual who would suggest that leased-access and PEG-access channels constitute the principal sources of our indecency problems on television? While, as the majority states, "there is no constitutional rule forbidding Congress from addressing only the most severe aspects of this problem," it is ridiculous to believe that leased-access and PEG-access present the most severe aspects of the indecency problem on television in American society.

The majority acknowledges that "there undoubtedly is indecent programming on other cable channels," but notes that "[o]perators have the power to impose a segregation and blocking system on the vast majority of their non-access channels, because their editorial control over such channels is unfettered by federal regulation." While cable operators may have that option, there is nothing to suggest that they are voluntarily segregating and blocking indecent programming in the absence of the Government's regulatory hand. And if Congress really believes that indecent programming is harmful to children, why are commercial cable operators given a free hand to do as they see fit? This makes no sense whatsoever.

The majority quotes the FCC, stating that cable operators generally may provide indecent programming through "per-program or per-channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b)." However, this is no answer at all, because the current arrangements for cable subscriptions do not purport to segregate "indecent" programs on select channels (or otherwise carefully identify them) so that they might be systematically offered in isolation apart from other commercial offerings. Furthermore, many subscribers purchase cable service to get improved television reception, and a number of basic cable subscriptions are packaged to include channels that offer some indecent programming; so these subscribers will get indecent programming whether they want it or not. In short, *if* "indecency" really is a problem on television, then the source of the problem resides on the commercial cable stations, not on leased-access and PEG-access channels. Yet, Congress has done nothing to facilitate parental supervision in connection with commercial cable programs.

Even more curious is Congress's failure to address violence on television. One recent poll revealed that eighty percent of Americans surveyed agreed that violence on TV shows is harmful to society. *See* 139 CONG. REC. S5050-52 (daily ed. Apr. 28, 1993) (summary of Times Mirror poll). And there is significant evidence suggesting a causal connection between viewing violence

on television and antisocial violent behavior.[1] Yet, as this case shows, Congress has focused on a mere pittance in addressing indecency on PEG- and leased-access cable, where viewership is paltry. And in focusing on indecency, as opposed to violence, Congress has addressed a "problem" that has yet to be shown to have any harmful effects. This is hard to fathom.

It is not my role as a judge to legislate, I understand. But it is hard to restrain from comment when one is asked to spend so much time on something of so little consequence in terms of its overall effect on society. From my vantage point, Congress seems to have sent the FCC on a fool's errand. Even if section 10 were constitutional — as the majority holds that it is — one still would be tempted to ask, "so what?". I cannot dismiss the importance of the First Amendment rights at stake, however, so I dissent. In my view, sections 10(a) and 10(b) of the Act as presently written offend the Constitution.

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[1] *See, e.g.*, ALBERT BANDURA, AGGRESSION: A SOCIAL LEARNING ANALYSIS 72-76 (1973); WILLIAM A. BELSON, TELEVISION VIOLENCE AND THE ADOLESCENT BOY (1978); GEORGE COMSTOCK, THE EVOLUTION OF AMERICAN TELEVISION 159-238 (1989); MONROE M. LEFKOWITZ ET AL., GROWING UP TO BE VIOLENT: A LONGITUDINAL STUDY OF THE DEVELOPMENT OF AGGRESSION (1977); L. Rowell Huesmann, et al., *The Effects of Television Violence on Aggression: A Reply to a Skeptic, in* PSYCHOLOGY AND SOCIAL POLICY 191 (Peter Suedfeld & Philip E. Tetlock, eds., 1992); David Pearl, *Familial, Peer, and Television Influences on Aggressive and Violent Behavior, in* CHILDHOOD AGGRESSION AND VIOLENCE: SOURCES OF INFLUENCE, PREVENTION, AND CONTROL 231, 236-37 (David H. Crowell et al., eds., 1987).

ROGERS, *Circuit Judge*, concurring in part and dissenting in part: Because the court is in agreement that § 10(b) constitutes state action,[1] the most important question in this case is whether the segregation and blocking method established by § 10(b) is the least restrictive means to accomplish the compelling state interests asserted. Essentially for the reasons noted by the Supreme Court in *Sable Communications, Inc. v. FCC*, 492 U.S. 115 (1989), the government has failed to support § 10(b) with the requisite showing that the segregation and blocking method represents the least restrictive alternative. It is neither carefully tailored nor supported by evidence that less restrictive alternatives are not readily available. Parts II and III of Judge Wald's dissenting opinion ably describe these deficiencies, and I join her conclusion that § 10(b) is unconstitutional whether it stands alone or in conjunction with the other provisions of § 10.

The court, however, has an obligation to save rather than destroy as much of the statute as is constitutional, *see Tilton v. Richardson*, 403 U.S. 672, 684 (1991) (citations omitted), and, in my view, § 10(b) is severable. Consequently I cannot join Judge Wald's analysis of the severability of § 10(b) from the remainder of § 10 or the constitutionality of the provisions remaining after severance. *See* dissenting opinion of Judge Wald at 10 n.7, 28-31; *see also* dissenting opinion of Chief Judge Edwards at 5.

> The standard for determining the severability of an unconstitutional provision is well established: Unless it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.

Alaska Airlines, Inc. v. Brock, 480 U.S. 678, 684 (1987) (internal quotation marks and citation omitted); *Buckley v. Valeo*, 424 U.S. 1, 108-09; *Champlin Refining Co. v. Corporate Comm'n.*, 286 U.S. 210, 234 (1932). "[T]he presumption is in favor of severability."

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[1] *See* majority opinion at Part III; dissenting opinion of Judge Wald at Part I; dissenting opinion of Chief Judge Edwards at 2.

Regan v. Time, Inc., 468 U.S. 641, 653 (1984) (plurality opinion); *see also Alaska Airlines*, 480 U.S. at 685 ("the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted").

This presumption is not rebutted with respect to the three remaining subsections — (a), (c), and (d). It is true, as Judge Wald notes, that one purpose of § 10 was to "forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (Senator Helms). *See* dissenting opinion of Judge Wald at 10 n.7. Senator Helms' statement quoted by Judge Wald, however, is not the only statement of Congressional intent with respect to § 10. Congress also intended to free cable operators from the burden of being required to carry indecent materials on both leased access and PEG channels. The clear purpose of § 10(c) is to empower cable operators to exercise editorial judgment over their PEG channels to prohibit sexually explicit conduct and materials soliciting or promoting unlawful conduct.[2] Similarly, one of the purposes of §§ 10(a) & (b) was to restore editorial control over leased access programming to the cable operators, a goal deemed of importance to several Senators who spoke in support of the amendments.[3] *See also* majority opinion at 19 ("The

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[2] Senator Fowler offered § 10(c) in order to remove the restriction on the authority of cable operators to prohibit indecent programming on PEG channels. 138 CONG. REC. S649 (daily ed. Jan. 30, 1992). He referred to the use of PEG channels to "basically solicit prostitution through easily discernible shams." *Id.* Senator Wirth, also decrying the abuse of PEG channels, spoke in support of § 10(c) as "giv[ing] a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now. This is a service not only to the public, but, also, to the cable companies themselves." *Id.* at S650.

[3] In introducing what became §§ 10(a) & (b), Senator Helms explained that "[t]he problem is that cable companies are required by law to carry, on leased access channels, any and every program that comes along . . . ." 138 CONG. REG. S646 (daily ed. Jan. 30, 1992) (regarding § 27 (continued...)

immediate aim . . . is to give cable operators the prerogative not to carry indecent programming on their access channels."). Implicit in these comments and the adoption of § 10(c) alone with respect to PEG channels, is the expectation that the restoration of such control would serve the Congressional goal of reducing the amount of indecent programming that appears on cable television and is therefore potentially accessible to children. Thus, it is clear that §§ 10(a) & (c) do fulfill at least one of the purposes of § 10, even when § 10(b) is severed. *See* 2 NORMAN J. SINGER, SUTHERLAND ON STATUTES & STATUTORY CONSTRUCTION § 44.07, at 518 (5th ed. 1993) (If a statute "attempts to accomplish two or more objects and is void as to one, it may still be valid as to the others.") (citation omitted).

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[3](...continued)

of the Senate bill). He explained that his amendment had two parts:

> Under my amendment, cable operators will have the right to reject such filthy programming, and if they do not reject it, consumers have the right to reject such programming from being fed into their homes.
>
> . . . .
>
> . . . First, the pending amendment will allow a cable company to decline to carry on leased access channels programs that "describe or depict sexual or excretory activities or organs in a patently offensive manner."
>
> . . . .
>
> The second part of the pending amendment . . . . requires the FCC to set rules [to segregate and block] unless a subscriber requests in writing such channel to be unblocked.

Id. In support of Senator Helms's amendment. Senator Thurmond also expressed a desire to relieve cable operators of the obligation of carrying indecent programming. "The problem is that cable companies are required by current law to carry on these leased channels any program that may come along." *Id.* at S648.

Once § 10(b) is severed, § 10(a) no less than § 10(c) would be constitutional. *See generally* majority opinion Part II;[4] *see also* dissenting opinion of Chief Judge Edwards at 2. Although the question is not without difficulty, that §§ 10(a) & (c) restore to cable operators editorial control over a narrow and content- based class of speech, *see* dissenting opinion of Judge Wald at 30, does not render them unconstitutional. *See* majority opinion at 14-15. Without the alternative regulatory scheme, imposing the combined technical, administrative, and financial burdens on cable operators as exists under § 10(b), the cable operator is left with the option, on the one hand, to allow, encourage, or facilitate indecent speech, or, on the other hand, to ban or otherwise impede indecent speech; there is no state imposed burden on the choice.

Accordingly, I concur in the judgment of the court upholding §§ 10(a), 10(c) and 10(d), but I dissent from the holding in Part III that the government has met its burden to show that § 10(b) is the least restrictive alternative; in that regard I join Parts II and III of Judge Wald's dissenting opinion.

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[4] I agree with the reasoning in Part II B only to the extent that the court concludes that petitioners have failed to show here, on this record, that the leased access and PEG channels are "public forums." *See* dissenting opinion of Judge Wald at 10 n.8.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

February 16, 1994

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

and Consolidated Cases

Before: MIKVA, *Chief Judge*, WALD, EDWARDS, SILBERMAN, BUCKLEY, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges*.

ORDER

PER CURIAM.

Respondents' Suggestion For Rehearing In Banc and the response thereto have been circulated to the full court. The taking of a vote was requested.

Thereafter, a majority of the judges of the court in regular, active service voted in favor of the suggestion. Upon consideration of the foregoing, it is

ORDERED, by the Court in banc, that the suggestion is granted and these cases will be reheard by the court sitting in banc. It is

FURTHER ORDERED, by the court in banc, that the judgment filed herein on November 23, 1993 be, 10 F.3d 812, and the same hereby is, vacated.

A future order will govern further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued Sept. 14, 1993 Decided Nov. 23, 1993

No. 93-1169

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1171

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC.;
AMERICAN CIVIL LIBERTIES UNION,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1270

ALLIANCE FOR COMMUNITY MEDIA;
ALLIANCE FOR COMMUNICATIONS DEMOCRACY;
PEOPLE FOR THE AMERICAN WAY,
PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

No. 93-1276

AMERICAN CIVIL LIBERTIES UNION,
PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,
RESPONDENTS

NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA; MEDIA ACCESS NEW YORK; BROOKLYN PRODUCERS' GROUP; DAVID CHANNON; NATIONAL CABLE TELEVISION ASSOCIATION, INC.,
INTERVENORS

Petitions for Review of Orders of the
Federal Communications Commission

I. Michael Greenberger argued the cause for petitioners in Nos. 93-1169, 93-1171, 93-1270 and 93-1276. With him on the joint briefs were *Charles S. Sims, Marjorie Heins, Lisolette E. Mitz, Arthur Barry Spitzer, James Ned Horwood, Andrew Jay Schwartzman* and *Elliot M. Mincberg*. *Michael Kenneth Isenman* entered an appearance for petitioners The Alliance for Communications Democracy and People for the American Way in No. 93-1270.

Gregory M. Christopher, Counsel, Federal Communications Commission, argued the cause for respondents. With him on the brief were *Renee Licht*, Acting General Counsel, Federal Communications Commission, *Daniel McMullen Armstrong*, Associate General Counsel, Federal Communications Commission, *Stuart E. Schiffer*, Acting Assistant Attorney General, United States Department of Justice, *Barbara L. Herwig* and *Jacob M. Lewis*, Attorneys, United States Department of Justice.

On the brief for intervenor National Cable Television Association, Inc. were *Daniel Leslie Brenner, Michael Stuart Schooler* and *Diane B. Burstein*.

On the joint brief for *amicus curiae* National Law Center for Children and Families and National Family Legal Foundation were *H. Robert Showers, Jr.*, and *James P. Mueller*.

Robert Thomas Perry entered an appearance for intervenors New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group and David Channon.

Paul J. McGeady, entered an appearance for *amicus curiae* Morality in Media in No. 93-1171.

Before MIKVA, *Chief Judge*, WALD and EDWARDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WALD.

WALD, *Circuit Judge*: Petitioners, a group of cable programmers and organizations of listeners and viewers, seek review of two orders issued by the Federal Communications

Commission ("FCC" or "Commission") regulating indecent programming on cable "access" channels. Access channels are those channels a cable operator must set aside for public, educational, or governmental use ("PEG access") or use by unaffiliated commercial programmers ("leased access").[1] We examine two constitutional questions: First, when the government compels private cable operators to relinquish editorial control over a certain number of "access" channels, making these available for general use by unaffiliated programmers, may it permit cable operators to deny access on those channels to programs that are "indecent," as defined by the FCC? Second, if the cable operator does not ban "indecent" programs from leased access channels, may the government compel the cable operators to place on a separate channel all leased access programs that the programmer, as required by law, has identified as "indecent," and to block such channel until the subscriber requests in writing that the block be lifted? As to the first question, we hold that not only does the First Amendment prohibit the government from banning all indecent speech from access channels, it also prevents the government from deputizing cable operators with the power to effect such a ban. As to the second question, in view of the constitutional problems of underinclusiveness presented by the total lack of regulation of indecent programming on commercial cable channels, we decline at this juncture to rule definitively on the constitutionality of the blocked access channel without permitting the Commission to cure the underinclusiveness of the regulations or to justify adequately its regulatory approach apart from the operator ban.

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[1] *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 7 F.C.C.R. 7709 (1992) (notice of proposed rulemaking); 8 F.C.C.R. 998 (1993) (first report and order); 8 F.C.C.R. 2638 (1993) (second report and order). These orders were issued pursuant to section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, § 10, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558).

I. BACKGROUND

When Congress passed the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 ("1984 Act"), it sought, among other things, to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public." 47 U.S.C. § 521. To achieve this goal, the 1984 Act required cable operators to set aside "leased access" channels for commercial use by any entity not affiliated with the cable operator. *Id.* at § 532(b). It further authorized franchising authorities to require cable operators to provide "PEG access" channels for public, educational and governmental use. *Id.* at § 531. Because the 1984 Act barred cable operators from exercising any editorial control over either type of access channels, *id.* at §§ 531(e), 532(c)(2) (amended 1992), it granted cable operators immunity from liability for any access channel programming, *id.* at § 558 (amended 1992).

The House Report on the 1984 Act conceived of access channels as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet." H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984). As such, Congress embraced access channels as a way to "provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." *Id.* However, the statute did not grant leased or PEG access to material unprotected by the Constitution. 47 U.S.C. §§ 532(h), 544(d) (amended 1992). In addition, Congress required cable operators to provide subscribers with a "lock-box" that would allow an adult to "prohibit viewing of a particular cable service during periods selected by that subscriber." *Id.* at § 544(d)(2)(A).

In 1992 Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) & 558) ("1992 Act" or "Act"). Section 10 of the Act ("section 10") worked two changes, now being challenged before this court. First, it permits a cable operator to prohibit indecent programming on all access channels. Pub. L. No. 102-385, § 10(a) & (c), 106 Stat. at 1486. Second, it compels those cable operators who do not bar

indecent programming on leased channels to place such material on separate channels that the subscriber can only view by prior written request. *Id.* at § 10(b). In detail, the 1992 Act gives cable operators the authority to refuse leased access to what they reasonably perceive to be indecent programming. *Id.* at § 10(a). It also requires the FCC to promulgate regulations with respect to leased access channels "requiring cable operators [who do not exercise their authority to refuse access to 'indecent material'] to place on a single channel all indecent programs, as identified by program providers." *Id.* at § 10(b). This channel must be blocked unless the subscriber requests access to the channel in writing. *Id.* The Act requires the FCC to promulgate regulations with respect to PEG channels, allowing the cable operator to prohibit "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." *Id.* at § 10(c). Finally, it removes cable operators' immunity from liability for access programming insofar as it "involves obscene material." *Id.* at § 10(d).

In late 1992 the Commission commenced informal rulemaking which resulted in the rules at issue in this case. *In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 7 F.C.C.R. 7709 (1992) (notice of proposed rulemaking); 8 F.C.C.R. 998 (1993) (first report and order) [hereinafter: "*First Report and Order*"]; 8 F.C.C.R. 2638 (1993) (second report and order). The implementing regulations largely track the statute. With respect to leased access they allow the cable operator to "prohibit[ ] any programming which it reasonably believes" is indecent; require programmers to identify any part of their own programming they consider indecent (failure of which would allow the cable operator to deny access); and require the cable operator either to keep such programming from being transmitted or to place all such programming on blocked channels to which the subscriber can request access in writing. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 7990, 7993 (1993) (to be codified at 47 C.F.R. § 76.701). With respect to PEG access, the regulations permit a cable operator to "prohibit . . . any

programming which contains obscene material, indecent material . . . , or material soliciting or promoting unlawful conduct[, *i.e.*] . . . material that is otherwise proscribed by law," and authorize cable operators to require programmers to certify that their programs do not contain any material in these categories. *Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 58 Fed. Reg. 19,623, 19,626 (1993) (to be codified at 47 C.F.R. § 76.702).

The regulations have been stayed pending review, and the petitions for review have been expedited and consolidated. *Alliance for Community Media v. FCC*, Nos. 93-1270 & 93-1276 (D.C. Cir. May 7, 1993) (order filed); *Alliance for Community Media v. FCC*, Nos. 93-1169 & 93-1171 (D.C. Cir. April 7, 1993) (order filed). Petitioners challenge section 10 of the 1992 Act and the FCC's implementing rules principally on the basis that they violate the First Amendment and the equal protection component of the Fifth Amendment.[2]

II. ANALYSIS

Petitioners charge that both the authorizing provisions of section 10 and the FCC's implementing regulations (i) are not the least

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[2] In addition, petitioners claim that the FCC changed its position from an earlier reliance on the efficacy of content-neutral lockboxes to the adoption of the more restrictive rules at issue here, and that this change in agency position violates the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-706. Joint Brief for Petitioners at 24, 33. Petitioners' reliance on the APA, however, is misplaced, because Congress has intervened and mandated the more restrictive alternative adopted by the Commission. *See, e.g., INS v. Chadha*, 462 U.S. 919, 955 (1983) (Congress may "legislatively alter[ ] or revoke[ ]" its "delegation of authority" (footnote omitted)). Congress' decisions are exempt from the requirements of the APA. 5 U.S.C. § 551(1). To require an agency to justify its change in position taken at the express direction of Congress would be tantamount to subjecting the legislative decision itself to the APA.

restrictive means to further the government's asserted interest, (ii) impermissibly regulate indecency only on access channels, (iii) will chill protected expression, and (iv) impose a prior restraint on speech without the constitutionally required procedural protections. We distill from this two constitutional questions.

First, when the government requires cable operators to set aside access channels for general use on a content-neutral basis, may it constitutionally permit cable operators to ban indecent material from these channels? The government responds that it may, maintaining that any resulting ban of indecent material from access channels would reflect the editorial judgment of private cable operators to whom First and Fifth Amendment strictures do not apply. For reasons set forth below, we reject the government's argument. Relying on our prior ruling in *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) ("*ACT II*"), we hold that the government may not constitutionally authorize a cable operator to ban indecent material from access channels.

Second, if cable operators do not exercise their authority to ban indecent material from *leased access* channels, may the government constitutionally require cable operators to segregate and block indecent material on those channels? Since we hold that the authorization of a complete ban on indecent material from access channels is unconstitutional, we must examine the constitutionality of a segregation and blocking requirement on leased access channels on its own. This in turn requires us to focus on the question of whether the statute and the FCC's implementing regulations impermissibly single out leased access channels for the imposition of a segregation and blocking requirement of indecent programming, while leaving commercial channels and (as a consequence of our decision) PEG channels wholly unregulated, *i.e.*, we must focus on the underinclusiveness of the leased channel blocking device. When the Congress and the Commission originally considered the blocked channel mechanism, they each did so in a context that presented some symmetry between PEG access, leased access, and commercial channels, due to cable operators' authority to exclude indecent material on all three types of channels.

Because we hold today that authorizing cable operators to ban indecent material from both PEG and leased access channels is unconstitutional, the remaining part of the regulation singles out leased access programmers for restrictions far more conspicuously than did Congress when it enacted section 10. As a result, we think it prudential to remand the case to the FCC so that it may consider the legality and/or desirability of the blocked channel device applied to leased access channels only. As a prelude to our analysis, we reiterate that indecent speech, as distinct from obscene speech, is protected by the Constitution. *See Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126, 109 S. Ct. 2829, 2836, 106 L.Ed.2d 93 (1989) (striking down ban on indecent telephone messages); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) ("*ACT I* ").[3]

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[3] In *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court announced a three-part test for determining whether material is "obscene," and therefore unprotected by the First Amendment: "(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable . . . law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 24 (internal quotes and citations omitted). Thus, for example, "[p]atently offensive representations or descriptions of ultimate sexual acts, . . . masturbation, excretory functions, and lewd exhibition of the genitals" could be considered obscene, unless they had "serious literary, artistic, political, or scientific value." *Id.* at 25-26. The Court in *Miller* thus essentially "isolate[d] 'hard core' pornography from expression protected by the First Amendment." *Id.* at 29.

The FCC, on the other hand, defines "indecent" material as material "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(g)). It would therefore include in its sweep material that does not appeal to the prurient interest or that taken as a whole may be of the highest literary, artistic,

(continued...)

A. *Section 10's Authorization of Cable Operators to Ban Indecent Programming From Leased Access and PEG Access Channels*

We examine first whether the statute and regulations trigger First and Fifth Amendment scrutiny. The constitutional guarantees of free speech and equal protection of the laws protect against incursion of these liberties by the government but not by private persons. *Hudgens v. NLRB*, 424 U.S. 507, 513 (1976) (free speech); *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952) (free speech and equal protection); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (equal protection). The government argues that the parts of the regulations authorizing cable operators to deny access to indecent material do not trigger First or Fifth Amendment analysis because a private cable operator — not the government — would be denying access to indecent material. *See, e.g.*, Respondents' Brief at 16. However, even where it is the decision of a private person which ultimately triggers the abridgment of speech, or effects the challenged discrimination, the state may nevertheless be held responsible if it significantly encouraged the private actor to commit the infringement. *See, e.g., Franz v. United States*, 707 F.2d 582, 592 n.38 (D.C. Cir. 1983) (holding government's encouragement through witness protection program of mother's decision to keep children from father constituted state action). We hold that section 10 significantly encourages the cable operator to ban indecent material, and that the cable operator's ban thus constitutes "state action."[4] As such, it is subject to the same constitutional

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[3](...continued)

political, or scientific value. For example, a truly scientific program — not merely a pretext for showing material that appeals to the prurient interest — that discusses the prevention of life-threatening diseases through the use of condoms could perhaps be considered "indecent" but would hardly seem to lack the scientific or social value so as to lose protection under the First Amendment.

[4] We follow the general usage of the phrase "state action" as encompassing federal, state, or local government action. *See* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.1, at p. 524 (2d Ed. 1992).

limitations as those directly constraining the government. In reaching this conclusion, we rely on the Supreme Court's state action doctrine and take specific guidance from *Reitman v. Mulkey*, 387 U.S. 369 (1967), a state action case involving government encouragement of private decisions to discriminate based on race.

1. *State Action in Cable Operators' Decision to Ban Indecent Material from Leased Access and PEG Access Channels*

The Supreme Court has not yet devised an infallible test for determining when actions of private parties are so inter-twined with governmental action as to be attributable to the government for purposes of a constitutional inquiry. The determination of whether state action exists in such cases is generally the result of a complicated and fact-specific inquiry. "Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Nevertheless, the Supreme Court has found state action to inhere in a variety of situations in which the constitutional violation is ultimately the result of a private decision. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE, § 16 (2d Ed. 1992). We start with the proposition that a state's general regulation of a private industry is insufficient in itself to establish state action. Even if the state confers a license or monopoly power upon a private entity, no state action will be found unless the state is specifically involved in the action being challenged. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). The Supreme Court has explained that "the inquiry must be whether there is a sufficiently close nexus between the State and the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 35 (citation omitted). *See Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). The government may, however, be held responsible for the decision of a private party if it has "provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *Blum*, 457 U.S. at 1004. *See Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982) (quoting *Blum*,

457 U.S. at 1004); *Jackson*, 457 U.S. at 357 (noting government did not place "imprimatur" on private action); *id.* at 357-58 & n.17 (noting absence of overt or covert encouragement by government); *accord Franz v. United States*, 707 F.2d 582, 592 n.38 (D.C. Cir. 1983).[5] The issue, then, for us is whether by statute or regulation the government has significantly encouraged private cable operators to ban indecent material from access channels.

Under the statute and regulations governing cable television, the cable operator is relieved of all editorial control over access channels, 47 U.S.C. §§ 531(e), 532(c)(2) (amended 1992), except in the case of constitutionally protected "indecent" material, as defined by the government. By granting the cable operators this exceptional authority to ban indecent material totally from access channels, the government expressly furthers an announced policy to limit children's access to such material. 1992 Act, § 10, 106 Stat. at 1486 (entitled "Children's Protection From Indecent Programming on Leased Access Channels").[6] In promotion of that policy, the government requires leased access programmers to identify any of their programming that contains indecent material, *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at § 76.701(d)-(f)), and permits cable operators to require PEG access programmers to identify any of their programs containing indecent material. *Implementation of Section 10*, 58 Fed. Reg. at 19626 (to be codified at § 76.702). Moreover, the government defines what constitutes "indecent" material, 1992 Act, § 10(a) &

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[5] In *Franz*, we noted that the single most reliable indicator of state action is "significant governmental promotion of the specific conduct." *Franz*, 707 F.2d at 592 n.38.

[6] Although the title of section 10 of the 1992 Act refers only to leased access channels, section 10 also includes the provisions concerning indecent programming on PEG access channels. 1992 Act, § 10(c), 106 Stat. at 1486.

(b), 106 Stat. at 1486,[7] and will step in to resolve certain disputes surrounding the administration of that standard, *First Report and Order*, 8 F.C.C.R. at 1010 ¶¶ 73-75.

The government argues nonetheless that, under the regulations, the cable operator is ultimately free to decide whether or not to deny access to indecent programming. The government maintains that with respect to access channels the 1992 Act simply restores to cable operators a measure of the editorial control they enjoyed prior to the 1984 Act. We do not find that argument convincing. The Supreme Court has consistently held the government responsible for discrimination that it significantly encourages and has refused to allow it to encourage discrimination on the part of private actors on grounds that it could not itself invoke. *Reitman v. Mulkey*, 387 U.S. 369 (1967).

In *Reitman*, a private property owner refused to rent an apartment to a couple based on race. He justified his action by citing to a state constitutional amendment establishing the right to discriminate in housing, which implicitly repealed earlier fair housing statutes. The United States Supreme Court affirmed the state supreme court's decision striking down the state amendment as violative of the Fourteenth Amendment, on the ground that "a prohibited state involvement could be found even where the state can be charged with only encouraging, rather than commanding

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[7] Section 10(a) authorizes the cable operator to prohibit leased access programming that "the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 1992 Act, § 10(a)(2), 106 Stat. at 1486. Section 10(b)'s blocking requirement defers to the FCC's definition of "indecent" material, *id.* at § 10(b), as material "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(g)). The Commission also applies the same definition of "indecent" material when regulating PEG access channels. *Implementation of Section 10*, 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702).

discrimination." 387 U.S. at 375 (internal quotes omitted). It approved the state court's decision which "quite properly" examined the amendment in "terms of its 'immediate objective,' its 'ultimate effect' and its 'historical context and the conditions existing prior to its enactment.'" *Id.* at 373 (quoting state supreme court). In *Reitman*, the Supreme Court rejected the argument that the amendment merely restored the power to discriminate that private property owners had enjoyed prior to the fair housing amendments. Instead, the Supreme Court upheld the state court's finding of state action and invalidation of the amendment based on an assessment that the amendment "was intended to authorize, and does authorize, racial discrimination in the housing market[; that t]he right to discriminate is now one of the basic policies of the State . . . [and that] the section will significantly encourage and involve the State in private discriminations." *Id.* at 381. Taking guidance from *Reitman*, we examine the regulatory scheme before us in terms of (a) its immediate objective, (b) the context in which the specific authorization to ban indecent material was issued, and (c) the regulations' ultimate effect.[8]

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[8] Unlike the case before us, *Reitman* involved an amendment to the state constitution that also banned future enactment of fair housing laws without an additional amendment of the state constitution. *See Hunter v. Erickson*, 393 U.S. 385, 389 (1969). The 1992 Act, of course, could be changed by simple legislation. That difference, however, is not critical in our reasoning. While *Reitman* notes that the right to discriminate "was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government," 387 U.S. at 377, it clearly did not rely on this fact for its basic reasoning, nor was its reasoning limited to the constitutional amendment context, as evidenced by its discussion of *McCabe v. Atchison, T. & S.F. Ry.*, 235 U.S. 151 (1914). In *McCabe* the Supreme Court dealt with a statute that required segregation of races in railway cars and, as construed by the Court, also permitted carriers to provide cars for whites only but not for blacks. 235 U.S. at 161. The *Reitman* Court said that the *McCabe* "Court made it clear that such a statute was invalid under the Fourteenth Amendment because a carrier refusing equal service to Negroes would be 'acting in the

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a. *The Immediate Objective of the Regulations*

There can be no doubt that the immediate objective of the 1992 Act is to suppress indecent material and limit its transmission on access channels, a purpose the government admits raises First Amendment concerns should state action be present.[9] The government argues before this court and section 10 itself states that the purpose of the regulation is to limit children's access to indecent material. 1992 Act, § 10, 106 Stat. at 1486.

b. *The Context of the Regulations*

The context of the regulations evinces an effort on the part of the government to enlist the cable operator in the suppression of

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[8](...continued)

matter under the authority of a state law.'" *Reitman*, 387 U.S. at 379 (quoting *McCabe*, 235 U.S. at 161-62). *Reitman* continued, "[t]his was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case." *Id*. Whether derived from a statute or a constitutional amendment, significant encouragement by the state of specific private acts suffices for a finding of state action. Such a finding depends upon the context surrounding the state's encouragement, not upon its technical status as constitutional amendment, statute, or administrative regulation.

We also decline to limit *Reitman* to the context of racial discrimination in violation of the Fourteenth Amendment. State action principles developed in the area of racial discrimination are not *sui generis*. Courts have frequently drawn on race discrimination cases for state action principles and applied them in other areas of the law. *See, e.g., Jackson*, 419 U.S. 345 (deprivation of property without due process of law), *Blum*, 457 U.S. 991 (denial of hearing prior to skilled nursing facilities' discharge or transfer of Medicaid patients), *Franz*, 707 F.2d at 590-94 (government's involvement in denial of husband's access to his children due to wife's membership in witness protection program).

[9] Indeed, the government's counsel conceded at oral argument that if the court finds state action, the government loses on the validity of that part of the regulations permitting the prohibition of all access to indecent programs.

indecent material. The government focuses the cable operator's attention on the only material the government seeks to suppress, and then permits the cable operator expressly to suppress that — and no other — material.

First, the regulations facilitate the identification of material the government wishes to suppress. In the case of leased access the regulations require cable programmers to identify indecent material contained in their programs, *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. § 76.701(d)-(f)), and in the case of PEG access the regulations expressly permit the cable operator to require such identification, *Implementation of Section 10*, 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702). These requirements of identification apply only with respect to the government-defined material. 58 Fed. Reg. at 7993, 19,626.

Next, the government has stripped the cable operator of any editorial control over cable access channels except for programming the government wishes to suppress. This aspect of the regulations persuades us to reject the government's reliance on three cases in which courts found no state action present in telephone companies' suppression of indecent messages furnished by message providers. *See Information Providers' Coalition for Defense of the First Amendment v. FCC*, 928 F.2d 866 (9th Cir. 1991) (finding no state action in carrier's compliance with governmental requirement to block indecent messages until adult customer requests block to be lifted); *Dial Info. Servs. Corp. of N.Y. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992) (same); *Carlin Communications, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988) (finding no state action in carrier's refusal to place any indecent messages on its message network where governmental prohibition was only directed at obscene material). At issue in each of these cases, were only those messages for which telephone companies would collect the fees from customers on behalf of the message providers. Messages for which the carrier did not provide these "billing services" could, in each of the three cases, be transmitted freely. Moreover, the carrier was under no governmental obligation to provide billing services to any message provider.

These cases held that governmental regulation of messages for which carriers voluntarily provided billing services was insufficient to convert the private action at issue into state action. *See Information Providers'*, 928 F.2d at 877; *Carlin*, 827 F.2d at 1293, 1295, 1297[10]; *Dial Info.*, 938 F.2d at 1543. We read the absence of state action in the telephone context to derive from the absence of any governmental coercion to provide billing services for message providers. In the case before us, on the other hand, the government *is* compelling the cable operator generally to accept all programming for leased and PEG access channels on a content-neutral basis, but allows the cable operator to refuse that access when the message is indecent. If access to a cable channel serves as the parallel to billing services in the telephone cases, there is, in our case, indeed a compulsion to provide the service generally, *i.e.*, on a content-neutral basis for nonindecent material. The government's involvement in the case before us is consequently far greater than in the telephone cases because the government permits no editorial control over cable access channels except when indecent material is involved. In this case, the cable operator must rely on section 10 of the Act and the contested regulations for authority to ban indecent programming, because the government does not permit the cable operator to refuse to carry a programmer's constitutionally protected speech for any other reason.[11] *Cf. Reitman*, 387 U.S. 369.

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[10] The significance of the fact that the carrier in *Carlin* was voluntarily providing billing services to message providers is somewhat buried in the case, but nevertheless obvious. While the *Carlin* court assumes that the telephone company must offer its service to all alike without discrimination, 827 F.2d at 1293, it rejects the idea that the carrier must provide access to its "976 network" on a content-neutral basis, *id.* at 1295, *i.e.*, access to the 976 network, which is the carrier's billing services network, *id.* at 1293, is entirely voluntary, *e.g.*, *id.* at 1297.

[11] Of course the regulations also permit the cable operator to ban "material that is otherwise proscribed by law." *Implementation of Section 10*, 58 Fed. Reg. at 19,626. For state action purposes the same analysis applies to the cable operator's editorial power over this type of material.

To sum up, the government first strips a cable operator of editorial power over access channels, then singles out the material it wishes to eliminate, and finally permits the cable operator to pull the trigger on that material only.[12]

c. *The Ultimate Effect of the Regulations*

The ultimate effect of this banning authorization is hardly in doubt; the legislative history indicates that many cable operators will eagerly ban indecent programming. *See* S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991).[13] Under the statute and regulations, the cable operators have no incentive whatsoever to allow indecent access programmers onto leased access or PEG access channels. Of course the very reason for mandating access in 1984 and for continuing to mandate access of nonindecent material in 1992 was that unaffiliated programmers are *unable* to gain access to regular, commercial cable channels. A cable programmer seeks access to either leased or PEG access channels precisely because a mutually agreeable arrangement to transmit the program on regular commercial channels cannot be reached. *See id.* Indeed, the Act even regulates the rates that a cable operator may charge a programmer for transmission on leased access channels precisely because cable operators have traditionally priced leased access out of the range of many programmers. *See* 1992 Act, § 9, 106 Stat. at 1484; S. REP. NO. 92, 102d Cong., 2nd Sess. 31. For all these reasons, the government can confidently rely on cable operators to

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[12] The context of the case before us presents an even stronger case for state action than that in *Reitman* where the amendment left the property owner free to discriminate on any grounds he chose.

[13] The fact that cable operators willingly follow the government's encouragement does not immunize the government from taking responsibility for those actions. *See Peterson v. City of Greenville*, 373 U.S. 244 (1963) (regardless of actual motivation of private party, government must take responsibility for result it commands); *accord Carlin*, 827 F.2d at 1295. To the contrary, *Reitman* illustrates that the government's reliance on the willing compliance of private citizens is a factor increasing--not diminishing--the government's involvement. *See, e.g.*, *Reitman*, 387 U.S. at 381-87 (Douglas, J., concurring).

grasp the opportunity to ban certain kinds of leased and PEG access programming if they are permitted to do so. In that respect, the regulations appear as "a form of sophisticated discrimination whereby the [government] . . . harness[es] the energies of private groups to do indirectly what [it] cannot [constitutionally] . . . do [itself]." *Reitman*, 387 U.S. at 383 (Douglas, J., concurring) (footnotes omitted).

We conclude therefore from the immediate regulatory objective, its context, and its ultimate effect, that the total denial of access for indecent material authorized under the statute and implementing regulations constitutes state action and is therefore subject to the same constitutional restrictions that constrain the government if it were to enforce such a ban directly.[14]

2. *Indecent Speech and the First Amendment*

Indecent, nonobscene language is protected by the First Amendment, but is not immune from regulation. *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (striking down total ban on 'indecent' commercial telephone messages); *ACT I*, 852 F.2d 1332, 1340 (D.C. Cir. 1988).

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[14] In the case of leased access, *Robinson v. Florida*, 378 U.S. 153 (1964), further supports our conclusion that state action attaches to the actions of a cable operator who must either ban indecent material or segregate and block such material. *Robinson* signals that if a state imposes considerable enough burdens on one of a private actor's alternative choices, the private party's choice of the less burdensome alternative will be fairly attributable to the state. In that case, a restaurant owner who refused to serve blacks had called the police to remove a racially mixed group. A state regulation required racially segregated lavatory facilities "where colored persons are employed or accommodated." 378 U.S. at 156 (internal quotes and citation omitted). This burden on restaurants serving customers of both races was sufficient to implicate the state in a private restaurant's refusal to serve blacks altogether. The Court held that the burden imposed by the regulation on serving customers of both races evidenced that the trespass convictions were more than the result of a purely private decision to discriminate, and so reflected "state policy." *Id.* at 156-57.

Reasonable time, place or manner restrictions on speech may be imposed, but where a statute regulates speech "in terms of subject matter[, t]he regulation '. . . slip[s] from the neutrality of time, place, and circumstance into a concern about content.'" *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972) (quoting Harry Kalven, Jr., *The Concept of the Public Forum:* COX V. LOUISIANA, 1965 SUP. CT. REV. 29). *See Pacific Gas & Elec. Co. v. Public Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986); *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 536 (1980); *ACT I*, 852 F.2d at 1343 n.18. Because section 10 expressly regulates access programming on the basis of whether it contains indecent material, it must be treated as a content-based restriction and cannot be considered a constitutionally permissible time, place, or manner regulation. Although content-based regulations "presumptively violate the First Amendment," *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986), the government "may . . . [, nevertheless] regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest," *Sable*, 492 U.S. at 126. *See Consolidated Edison*, 447 U.S. at 540; *ACT I*, 852 F.2d at 1343 n.18.

3. *Least Restrictive Means*

The government's interest in "limiting the access of children to indecent programming," 1992 Act, § 10(b), 106 Stat. at 1486, has been recognized as a compelling interest. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (upholding FCC's ruling that broadcasting of indecent program in mid-afternoon was in violation of indecency prohibition); *Dial Info.*, 938 F.2d at 1541. While we acknowledge for purposes of this analysis the importance of this interest, we are unpersuaded that the authorization of a ban on indecent material presents the least restrictive means of furthering the asserted interest.[15] The government quite candidly admitted at argument

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[15] *Amici Curiae*, Morality in Media, the National Family Legal Foundation and the National Law Center for Children and Families, urge

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that if a cable operator's ban of indecent programming from access channels constitutes state action, that ban is unconstitutional. The total denial of access based solely on the fact that the content of the protected speech is "indecent" raises the specter of "reduc[ing] the adult population . . . [to receiving] only what is fit for children" by permitting and encouraging the cable operator to do just that. *Butler v. Michigan*, 352 U.S. 380, 383 (1957). *See Sable*, 492 U.S. at 127-31; *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983) (striking down prohibition on mailing of unsolicited advertisements for contraceptives).

This court held in *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), that in attempting to regulate indecency in broadcasting, Congress could not constitutionally enact a complete ban. *Id.* at 1509. We found in that case that the Constitution required some safe harbor period during which "indecent" material may be broadcast. *Id.* We have been presented with no evidence why the context of cable television should command a different conclusion. The government has not advanced any reason why its interest in limiting children's access to indecent material is substantially impugned by providing some safe harbor during which indecent material may be transmitted on the cable network. Nor has it convincingly shown that a variety of less drastic restrictions on indecent programming short of a total ban are ineffective.

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[15](...continued)

that we analyze this ban as merely a refusal of the government to subsidize indecent speech and as such not a subject of strict scrutiny. Brief of *Amici Curiae* at 12-20. Such analysis would, however, require us to go much beyond existing law in determining whether access channels qualify as subsidies and if they do whether their *sui generis* nature as a communication media requires different standards from other subsidies. Neither party has raised this issue in those terms and, moreover, the government has conceded that the bans are unconstitutional if they involve state action. Therefore, we do not believe we are required to undertake such an alternative analysis, involving as it would many complex and as yet undecided constitutional questions in its own right.

The fact that a total ban on indecent programming is not the least restrictive alternative in the case of cable is recognized in the terms of the Act itself. Section 10 of the Act provides the cable operator with the choice of a patently less restrictive means to further the government's interest. The cable operator may transmit indecent material if it places such programming on a separate channel which can only be viewed at the subscriber's express request. 1992 Act, § 10(b), 106 Stat. at 1486. Since Congress has itself judged a channel-block to be an adequate means of furthering its compelling interest, it may not be heard to argue that authorization of a complete ban by cable operators is the only effective means of furthering that interest. Our conclusion as to the unconstitutionality of section 10's authorized denial of any access for indecent programming thus needs no further examination of other, less restrictive means, such as lockboxes, or segregation of indecent material with optional blocking at the subscriber's request. The ban falls under any application of the least restrictive means test.[16]

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[16] In addition to challenging the authorization of cable operators to ban indecent material, petitioners also challenge the regulations' authorization of cable operators to ban from PEG channels material that is "proscribed by law." *Implementation of Section 10*, 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702). Petitioners charge that the operator ban on material proscribed by law is an unconstitutional prior restraint and that the FCC improperly interpreted the underlying statutory language of section 10 which permits cable operators to deny PEG access to "material soliciting or promoting unlawful conduct." 1992 Act, § 10(c), 106 Stat. at 1486. For the reasons expressed in the text of this opinion, we believe that the authorization of cable operators to ban such material proscribed by law constitutes state action. The FCC appeared to concede at oral argument that should state action inhere in any ban involved in this case, such ban would contravene the First Amendment.

An examination of the PEG regulation itself also suggests constitutional infirmity. Even if we limited the regulatory language, which permits a ban on material "proscribed by law," to encompass only material that is constitutionally proscribable under *Brandenburg v. Ohio*, 395 U.S.

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B. *Segregation and Blocking Requirement for Indecent Material on Leased Access Channels*

Having found the authorization to ban indecent material from access channels unconstitutional, we turn now to whether the remainder of the indecency regulation passes constitutional muster. Since we believe that the segregation and blocking requirement as applied only to leased access channels is inadequately justified, we express no opinion as to the general viability of a segregation and blocking approach in regulating indecent material in the cable medium.

Petitioners charge, *inter alia*, that the segregation and blocking requirement impermissibly singles out leased access programmers for regulation, leaving indecent material on commercial channels

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[16](...continued)

444, 447 (1969) ("constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action" (footnote omitted)), and *Hess v. Indiana*, 414 U.S. 105 (1973) (same), the ban could still be challenged as an unlawful prior restraint, because it lacks the proper safeguards required by the Constitution. "[A] system of prior restraint runs afoul of the First Amendment if it lacks certain safeguards: *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561 (1975).

The absence of such safeguards is similarly evident in the Commission's authorization of cable operators to ban obscene material. See 1992 Act, § 10, 106 Stat. at 1486; *Implementation of Section 10*, 58 Fed. Reg. at 7993 (to be codified at 47 C.F.R. 76.701(a)); 58 Fed. Reg. at 19,626 (to be codified at 47 C.F.R. § 76.702).

Since we are remanding other parts of the regulations to the FCC for other reasons, it will have ample opportunity to reexamine these remaining PEG ban issues.

and (as a result of our ruling) PEG channels unregulated. The government responds that any differential treatment present in the regulatory scheme satisfies the minimal standard of rational scrutiny to be applied in this case. *See* Respondents' Brief at 30. As we discuss below, the government misapprehends the applicable legal standard.

1. *Underinclusiveness and the First Amendment*

The Supreme Court has long recognized that the principles of equal protection and of the First Amendment are intertwined. *See Niemotko v. Maryland*, 340 U.S. 268 (1951); *Mosley*, 408 U.S. at 94-95; *Carey v. Brown*, 447 U.S. 455 (1980); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227-28 n.3 (1987); *see also* 4 ROTRUNDA & NOWAK, *supra*, § 20.11, at p. 48; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975); Geoffrey Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 201-07 (1983) (noting dangers of emphasizing equal protection in the area of free speech). Under both equal protection and First Amendment analyses, when a regulation aimed at alleviating a problem singles out only some persons contributing to the problem and not others who are similarly situated, the regulation is called "underinclusive." "All who are included in the class are tainted with the mischief, but there are others also tainted whom the classification does not include." Joseph Tussmann and Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 348 (1949). *See also* MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH § 2.06[B] (1984 & Supp. 1992 (RODNEY A. SMOLLA, ED.)). In First Amendment cases that involve the differential treatment of speakers, "[a]s in all equal protection cases . . . the crucial question is whether there is an appropriate governmental interest suitably furthered by the differential treatment." *Mosley*, 408 U.S. at 95

(citations omitted). *See also First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 784-86 (1978).[17]

While the Supreme Court has recently noted that the First Amendment does not prohibit underinclusiveness *per se*, *see R.A.V. v. City of St. Paul, Minn.*, 112 S. Ct. 2538, 2545 (1992), it has consistently applied two principles in examining the underinclusiveness of a restriction on speech. First, the Court has

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[17] While we might analyze this case solely under equal protection principles, we primarily apply First Amendment doctrine because of the centrality of the abridgement of petitioners' free speech. *Cf. Arkansas Writers' Project*, 481 U.S. at 227-28 n.3. Under the guarantee of equal protection, when legislating in the area of economic or social policy, the government is generally free to strike against an evil one blow at a time, *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101-02 (1993); *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949), but a legislative choice burdening the exercise of a fundamental right must pass strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 216-17 & n.15 (1982). While the freedom of speech is, of course, a fundamental right, *e.g.*, *Grosjean v. American Press Co.*, 297 U.S. 233, 244 (1936), courts have developed different standards for its restriction depending on the particulars of the speech or the type of regulation at issue. *Compare, e.g., Regan v. Taxation With Representation*, 461 U.S. 540 (1983) (holding where contributions to lobbying organization were generally not tax exempt, exception for veterans organization was speaker-based discrimination not aimed at the suppression of ideas and satisfied rational scrutiny), *with Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 585 (1983) ("Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." (footnote omitted)); *compare Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (upholding fairness doctrine and right to reply requirement for broadcasting), *and FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down restriction on editorializing by noncommercial educational broadcasting stations receiving federal funds) *with Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (striking down requirement that newspaper grant right to reply).

held that a restriction on speech may not single out a class of speakers on the basis of criteria that are wholly unrelated to the interest sought to be advanced. *See City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505, 1509, 1517 (1993) (holding removal of commercial newsracks in order to promote safety and aesthetics in violation of First Amendment because noncommercial newsracks posing identical problems remained unregulated); *Florida Star v. B.J.F.*, 491 U.S. 524 (1989) (striking down prohibition on disclosure of sexual offense victims' names where prohibition applied only to instruments of mass communication); *Carey*, 447 U.S. at 465 (holding unconstitutional prohibition on residential picketing in part because exception for peaceful "labor picketing" was unrelated to asserted interest in promoting the privacy of the home). Second, the Court has consistently held that a restriction on constitutionally protected speech must — at a minimum — substantially advance the asserted interest. *See FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (striking down ban on editorializing by noncommercial educational broadcast stations receiving federal funds where prohibition did not substantially promote asserted interest); *Bellotti*, 435 U.S. 765 (same for prohibition on certain corporate speech). Thus the Court has invalidated restrictions on speech in cases where the differential treatment of speakers by a partial regulation remained unjustified in terms related to the asserted interest, or where the regulation did not substantially accomplish the asserted goal.[18] *See also Smith v.*

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[18] Finding a regulation underinclusive need not imply that the government is surreptitiously attempting to further a different, unarticulated interest, but leads to the ultimate conclusion that the regulation, and in particular the classification employed, is not tailored to serve the compelling interest. *Accord News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988); *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (en banc). Without impugning the legislative motive, a court may judge that because the interest asserted is not substantially furthered by the regulation "the 'sacrifice [of] First Amendment protections for so speculative a gain is not warranted . . . .'" *League of Women Voters*, 468 U.S. at 397 (quoting

(continued...)

Daily Mail Publishing Co., 443 U.S. 97, 104-05 (1979) (holding statute prohibiting newspapers from publishing juvenile defendant's name unconstitutional because, *inter alia*, in absence of regulation of electronic media it did not accomplish the stated purpose). *But see R.A.V.*, 112 S. Ct. at 2545 (underinclusiveness permissible where totally proscribable speech is at issue and there is no regulation of content) (dictum).[19]

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[18](...continued)

Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 127 (1987)). *Cf. Minneapolis Star*, 460 U.S. at 592 ("We need not and do not impugn the motives of the . . . [l]egislature. Illicit legislative intent is not the *sine qua non* of a violation of the First Amendment." (citations omitted)); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991).

[19] The Supreme Court recently noted in *R.A.V.*:

> There is no problem whatever, for example, with a State's prohibiting obscenity (and other forms of proscribable expression) only in certain media or markets, for although that prohibition would be "underinclusive," it would not discriminate on the basis of content.

112 S. Ct. at 2545 (citing *Sable*, 492 U.S. at 124-26. The government's reliance on this passage for the proposition that indecent material may constitutionally be regulated on leased access alone is unwarranted. *See* Respondents' Brief at 29.

The cited passage from *R.A.V.* adds little to our case. First, the passage is dictum because *R.A.V.* held that the statute under review in that case did not pass constitutional muster, 112 S. Ct. at 2550. Furthermore, *R.A.V.* notes that the underinclusiveness of a regulation restricting "totally proscribable speech" need not be justified by reference to a neutral basis only "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot." *Id.* at 2547. The case before us differs in both of these respects. Unlike the fighting words at issue in *R.A.V.*, 112 S. Ct. at 2542, the "indecent" material at issue here is constitutionally protected speech, *Sable*, 492 U.S.

(continued...)

2. *Florida Star, Bellotti, and League of Women Voters*

Applying those constitutional principles to this case, we find that section 10 singles out programmers on leased access channels for regulation, while leaving similar programmers on commercial channels unregulated. *Florida Star, Bellotti*, and *League of Women Voters* similarly involved content-based regulations that selectively applied only to some speakers while leaving identical speech uttered by others unregulated.

In *Florida Star*, the Supreme Court held that a statute prohibiting the publication of a rape victim's name was facially underinclusive because it applied only to "instrument[s] of mass communication," calling into question whether the law advanced the significant interests invoked by the state. 491 U.S. at 540 (internal quotes and citation omitted). The state was under an obligation to "demonstrate its commitment to advancing th[e asserted] interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant." *Id.* "[W]here a newspaper publishes truthful information which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order[;] . . . no such interest [was] satisfactorily served by" the prohibition in *Florida Star*. *Id.* at 541. The publication of the victim's name in instruments of smaller, local communication appeared equally damaging to the government's asserted interest, and the regulation could not simply "be defended on the ground that partial prohibitions may effect partial relief." *Id.* (citations omitted). *See id.* at 541-42 (Scalia, J., concurring in part) (noting underinclusiveness should suffice for holding the prohibition unconstitutional).

In *Bellotti*, the statute prohibited specified business corporations from spending funds to publicize their views concerning a state

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[19](...continued)

at 126. Moreover, there is a much more realistic chance that official suppression of ideas is afoot in this situation, since access programmers tend to be a distinctly alternative voice to the mainstream media. *See* H.R.REP. No. 934, 98th Cong., 2d Sess. 30 (1984).

income tax amendment. The Supreme Court affirmed the principle that the "legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." 435 U.S. at 784-85 (citing *Mosley*, 408 U.S. at 96). In that case the state had argued, *inter alia*, that the statute protected corporate shareholders who did not want their resources spent on propagating views they did not hold. The Court noted that first, the statute restricted corporate speech only with respect to one kind of ballot question and did not apply to other corporate speech presenting the same trapped shareholder problem. *Id.* 435 U.S. at 793. Moreover, the restriction applied only to banks and not other organizations in which individuals may have a comparable membership interest. *Id.*[20] In other words, the statute at issue in *Bellotti* did not substantially advance the government's interest in protecting trapped shareholders. In striking down the statute, the Court concluded that even assuming the compelling nature of the government's interest in protecting the shareholder, there was "'no substantially relevant correlation between the governmental interest asserted and the State's effort' to prohibit" the corporation from speaking. *Id.* at 795 (quoting *Shelton v. Tucker*, 364 U.S. 479, 485 (1960)).

League of Women Voters also struck down a restriction on speech that did not substantially advance the asserted interest. At issue was a prohibition on "editorializing" by noncommercial educational broadcasting stations receiving funds from the Corporation for Public Broadcasting ("CPB"). 468 U.S. at 366. As with section 10's exclusive focus on "indecent" speech, the prohibition in *League of Women Voters* was targeted at the content of the speech. *See id.* at 383. The government had argued that the ban was necessary first, to protect stations from becoming the government's "mouthpiece," and, second, to protect them from capture by private interest groups. The Court found that the first interest was not "substantially advanced" by the prohibition. *Id.* at

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[20] The Court also noted the statute's overinclusiveness because the statute prohibited corporate speech on the income tax amendment even when expressly authorized by the shareholders. *Id.* at 794.

388. In partial support of that finding the Court noted that the regulation applied exclusively to local station editorials leaving unregulated CPB-funded *programs* which are distributed nationally and "truly have the potential to reach a large audience and . . . have the kind of genuine national impact that might trigger" the purported government coercion that the regulation was aimed to prevent. *Id.* at 391. In other words, if the regulation were truly targeting the problem of government influence as a result of government funding, it could not consistent with the First Amendment single out for regulation editorializing by local broadcast stations receiving government funds, while leaving unregulated nationally distributed programs similarly receiving government funds. The statute did not substantially advance the first interest because it left unregulated the identical problem existing (more egregiously) in a different segment of the same medium. As for advancing the second interest, *i.e.*, preventing stations' capture by private interest groups, the regulations were underinclusive as well "since the very same opinions that cannot be expressed by the station's management may be aired so long as they are communicated by a commentator or by a guest appearing at the invitation of the station during an interview." *Id.* at 396 (citation omitted). The second interest, therefore, was advanced little — if at all — by the statute. Section 10(b) similarly permits the same indecent material that is segregated and blocked on leased access channels to be transmitted without restriction on commercial channels which are often national and have a far greater audience.

3. *The Underinclusiveness of Section 10*

The ultimate question surrounding a restriction on free speech remains, of course, whether the government's interest is compelling and "whether the statute — particularly the challenged classification — is narrowly tailored to serve that interest." *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102, 1123 (D.C. Cir. 1978) (en banc). However, as *Florida Star, Bellotti*, and *League of Women Voters* indicate, a content-based restriction on rights secured by the First Amendment must, at a minimum, substantially advance the asserted compelling interest and must explain the differential treatment in terms relevant to the interest

asserted. Examining the legislative findings as we must, *see Sable*, 492 U.S. at 129 ("'Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake.'") (quoting *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)); *League of Women Voters*, 468 U.S. at 387-88 n.18 (same), we find that section 10's exclusive focus on leased access for the regulation of indecent speech bears a limited relation at best to the goal of limiting children's exposure to "indecent" programming. Section 10 certainly does not substantially advance that interest, since the identical kind of programming may be transmitted freely on regular commercial channels.

The government argues that its regulation legitimately targets the "squeaky wheel" of indecency on cable access channels. Respondents' Brief at 29. The only evidence supporting the contention that leased access channels present a particular problem with respect to indecency is first, the Commission's assertion that because "no single editor control[s] . . . selection and presentation . . . on these channels, indecent programming may be especially likely to be shown randomly or intermittently between non-indecent programs," and second, Senator Helms' statements on the Senate floor invoking anecdotal evidence of exposure to sexually explicit material on leased access channels. *First Report and Order*, 8 F.C.C.R. at 1000 ¶ 15, 1001 ¶ 20 & n.20. The FCC proffers no empirical evidence supporting the contention that leased access channels present a special problem of indecent programming that is absent from commercial channels. For example, it presents no evidence that indecent material on access channels takes viewers by surprise in a manner that regular commercial programming does not; there is no evidence that program guides are less helpful in the access context; no evidence regarding the relative prevalence, or severity of indecent material on leased access versus regular commercial channels; and no evidence indicating that children are more frequently exposed to indecent material on leased access channels than on regular commercial channels. Finally, while the Commission may be correct in noting that access channels, unlike pay channels, are part of the basic cable package and thus not individually invited into a customer's home, *see First Report and*

Order, 8 F.C.C.R. at 1001 ¶ 20 n.20 (quoting 138 CONG. REC. S646 (daily ed. Jan. 30 1992) (statement by Sen. Helms)); *see also* 138 CONG. REC. S648 (statement by Sen. Thurmond) (same), the same thing certainly is true of the commercial channels that make up the basic cable package and are unregulated by section 10. An indecent program would seem to be equally offensive whether transmitted on leased access channels or commercial channels. *Cf. Discovery Network*, 113 S. Ct. at 1514. In sum, the government has not yet sufficiently justified why free access by programmers should trigger the regulation of indecency.[21] As currently argued, free access "is not an acceptable surrogate for injury," *Florida Star*, 491 U.S. at 540; without further justification, the lack of regulation of commercial channels on the one hand and the regulation of leased access on the other, seems to be unadorned, unsubstantiated preference of one speaker over another.

By failing to address the problem of indecent material on regular commercial channels which represent the greater part of the cable medium and reach the same audience (in larger numbers), a serious argument can be made that the regulation selects programmers for regulation by a criterion (*i.e.*, leased access) unrelated to the asserted interest and that the resulting partial regulation does not substantially further the government's asserted interest. This would lead us to hold that the statute and implementing regulations are not narrowly tailored to serve the asserted interest. However, for reasons stated below, instead of striking down this part of the regulation, we remand the case to allow the FCC either to justify or to cure the underinclusiveness of the selective approach to the regulation of indecency represented by the remainder of the regulation after the total ban provision has been struck down. Should it decide to pursue the former path, it

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[21] Of course even if the government's first contention were proven to be true, *i.e.*, that indecent material on access channels takes viewers by surprise because no single editor controls access channels, the FCC remains under an obligation to demonstrate that its regulation presents the least restrictive remedy for that problem. *Cf. League of Women Voters*, 468 U.S. at 395.

must explain the selective regulation of leased access channels in terms relevant to the government's asserted goal and determine the impact of the regulation on the accomplishment of the asserted interests. In so doing, the FCC may examine, *inter alia*, the relative prevalence and severity of and the relative exposure of children to indecent material on leased access channels.

C. *Remand to the FCC*

The segregation and blocking requirements apply only to leased access channels. As enacted by Congress, section 10's regulation of indecency exhibited some measure of symmetry among leased access, PEG access and regular commercial channels, because the cable operator could eliminate indecent material from all three types of channels. We have held today that authorizing cable operators to ban indecent material from leased and PEG access channels is unconstitutional. Were this provision to be severed from the regulations, the remainder of the regulations would require indecent material on leased access channels to be segregated and blocked, while leaving PEG access and regular commercial channels free from any regulation. Moreover, while the cable operator would remain free to regulate indecent material on regular commercial channels, the cable operator is now absolutely prohibited from regulating constitutionally protected indecent material on PEG channels. In other words, were we to sever the segregation and blocking requirement, the result would be a regulatory scheme which singles out indecent material on leased access channels alone for regulation, seemingly without adequate justification. We are therefore reluctant to sever that part of the regulations authorizing a complete ban on indecent access programming from the blocked channel portion and to reach out to decide the constitutional issue presented thereby both as to underinclusiveness and as to the blocked access technique itself, without permitting the FCC to decide again if this is a desirable or feasible regulatory scheme.

"'The cardinal principle of statutory construction is to save and not to destroy.'" *Tilton v. Richardson*, 403 U.S. 672, 684 (1971) (plurality) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). "The standard for determining the severability of an unconstitutional provision is well established: 'Unless it is

evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law.'" *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley v. Valeo*, 424 U.S. 1, 108 (1976) (*per curiam*)) (internal quotes and citation omitted). The presumption of severability has been held to vary with the existence of a severability clause in the statute in question. *See Electric Bond & Share Co. v. SEC*, 303 U.S. 419, 434 (1938) (severability clause reverses presumption of inseparability); *Carter v. Carter Coal Co.*, 298 U.S. 238, 312 (1936) (same). More recently, however, the Supreme Court has indicated a presumption in favor of severability regardless of the existence of a severability clause: "the unconstitutional provision must be severed unless the statute created in its absence is legislation that Congress would not have enacted." *Alaska Airlines*, 480 U.S. at 685 (footnote omitted). *See id.* at 686 ("Congress' silence is just that — silence — and does not raise a presumption against severability") (citing *Tilton*, 403 U.S. at 684 (plurality) and *United States v. Jackson*, 390 U.S. 570, 585 n.27 (1968)); *accord Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). *But see Consumer Energy Council of America v. Federal Energy Regulatory Comm'n*, 673 F.2d 425, 442 (D.C. Cir. 1982) ("We do not view the imposition of any unspecified burden on either side as beneficial to the inquiry."), *aff'd sub nom. Process Gas Consumers Group v. Consumer Energy Council*, 463 U.S. 1216 (1983); *accord Jackson*, 390 U.S. at 585 n.27 ("determination of severability will rarely turn on the presence or absence of" severability clause).

The analysis differs little in the context of invalidating provisions of regulations promulgated by an agency. *See, e.g., K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 294 (1988). But where an agency is involved, a court need not strike down a regulation to effect a reconsideration by the issuing body. Thus, a court will issue a remand to the issuing agency if there is "substantial doubt" as to whether the agency intended its regulation to be severable. *North Carolina v. Federal Energy Regulatory Comm'n*, 730 F.2d 790, 795-96 (D.C. Cir. 1984). Such a remand is often in the best interest of justice in that it allows the agency to reconsider the

residue of its original regulation and keeps judges out of the business of administrators. *See Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17 (1952) (overturning judicial severance of license conditions, remanding instead to FPC for new license determination in light of invalid provisions); *Addison v. Holly Hill Fruit Prods., Inc.*, 322 U.S. 607, 618-23 (1944) (overturning judicial construction of act and requiring instead Administrator to decide challenged definition anew in light of partial invalidation); *Sheet Metal Workers, Local Union No. 91 v. NLRB*, 905 F.2d 417, 422-24 (D.C. Cir. 1990) (remanding case to NLRB to consider severability of unlawful clause in labor contract); *[Anonymous] v. Federal Deposit Ins. Corp.*, 617 F. Supp. 509, 518 (D.D.C.1985) (permitting agency to reconsider order in its entirety, giving it "the maximum possible freedom to tailor precisely any . . . order necessary"). We are particularly reluctant to reach out and decide constitutional issues that might dissolve upon a remand to the issuing agency. *See Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987). While we acknowledge that it is not within the jurisdiction of the FCC to declare an act of Congress unconstitutional, *Johnson v. Robison*, 415 U.S. 361, 368 (1974), the Commission may take constitutional considerations into account when promulgating rules. The Commission might, for example, draw on other statutory authority to broaden its restriction on "indecent" programming so as to mitigate the underinclusiveness of its present regulation. We express no opinion on the existence of other sources of statutory authority and believe that it is best left to the expert interpretation of the agency in the first instance.

The Commission did at one point consider the constitutional ramifications of distinguishing between leased access and commercial channels when imposing the segregation and blocking requirement. *See First Report and Order*, 8 F.C.C.R. at 1001 ¶¶ 18-20. However, the Commission's examination took place in the context of a broader regulation key parts of which have now been held unconstitutional. Its treatment of the "underinclusiveness" issue in any case was somewhat cursory and we cannot readily transfer that rationale to a situation in which only

leased access channels are now regulated and only in one particular way.

III. Conclusion

Congress and the FCC sought to create a regulatory scheme in order to restrict children's exposure to indecent material on cable access channels. We do not denigrate its attempt to protect children. However, part of its execution in this case runs afoul of our Constitution. Congress and the FCC authorized private cable operators to ban indecent material from cable access channels in a manner that imbued those private cable operators with state action sufficient to trigger constitutional restrictions on their decision to ban indecent material. As a result, under our prior holding in *ACT II*, 932 F.2d 1504 (D.C. Cir. 1991), the authorization of a complete ban on indecent material from access channels is unconstitutional under the First Amendment. The remainder of the regulation dealing with the blocked channel alternative would now apply only to leased access channels while leaving indecent material on regular commercial channels and (as a result of our decision) PEG channels unregulated. This selective regulation of leased access channels alone could itself run afoul of the First Amendment if children remain abundantly exposed to indecent material on other similar cable channels, and unless the selective restriction is justified in terms relevant to the government's asserted interest in imposing the requirement. Reluctant to rule on constitutional issues prematurely, we remand the case to the FCC for reconsideration of the underinclusiveness of the remaining regulatory scheme in light of our invalidation of the portions authorizing cable operators to ban indecent material from all access channels. The stays ordered are hereby continued pending completion of proceedings on remand.

So ordered.

Sec. 10. Children's Protection From Indecent Programming on Leased Access Channels

(a) AUTHORITY TO ENFORCE. — Section 612(h) of the Communications Act of 1934 (47 U.S.C. 532(h)) is amended —

(1) by inserting "or the cable operator" after "franchising authority"; and

(2) by adding at the end thereof the following: "This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.".

(b) COMMISSION REGULATIONS. — Section 612 of the Communications Act of 1934 (47 U.S.C. 532) is amended by inserting after subsection (i) (as added by section 9(c) of this Act) the following new subsection:

"(j)(1) Within 120 days following the date of the enactment of this subsection, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

"(A)requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

"(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

"(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

"(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).".

(c) PROHIBITS SYSTEM USE. — Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

(d) CONFORMING AMENDMENT. — Section 638 of the Communications Act of 1934 (47 U.S.C. 558) is amended by striking the period at the end and inserting the following: "unless the program involves obscene material.".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-258

In the Matter of

Implementation of Section 10 of the
Cable Consumer Protection and
Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

FIRST REPORT AND ORDER

Adopted: February 1, 1993; Released: February 3, 1993

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub.L. No. 102-385, permits cable operators to enforce voluntarily a written and published policy of prohibiting indecent programming on commercial leased access channels on their systems.[1] Section 10(b) of the Act requires the Commission to adopt regulations that are designed to restrict access of children to indecent programming on leased access channels (that is not voluntarily prohibited under section 10(a)) by requiring cable operators to place indecent leased access programming, as identified by program providers, on a

[1] Section 10(a) is self-effectuating and became effective December 4, 1992.

"blocked"leased access channel. On November 5, 1992, the Commission adopted a *Notice of Proposed Rule Making* in this proceeding, 7 FCC Rcd 7709 (1992), seeking comment on implementation of section 10(b) and related matters. This *Report and Order* adopts rules and regulations that implement section 10(b) of the Act and clarifies other aspects of section 10 related thereto.[2]

2. In the following paragraphs, we discuss the major issues raised by the comments and our conclusions with respect to those issues.[3] Before turning to specifics relating to the statute's implementation, we shall first address the general comments directed to the constitutionality of section 10 and to the adequacy of our *Notice* under the requirements of the Administrative Procedure Act, 5 U.S.C. § 553.

II. SECTION 10'S CONSTITUTIONALITY

3. Many commenters challenge the constitutional validity of section 10 of the Cable Act. Alliance, for example, challenges the constitutionality of both section 10 and the Commission's proposed rule seeking to implement the section. Alliance believes that the statute is unconstitutional because it impermissibly restricts the first amendment rights of access programmers. Restrictions on indecent programming, according to Alliance, may not be applied to cable, unlike other media such as broadcasting, because cable subscribers are not "captive audiences" and, through cable technology, such subscribers have greater control over programming and information

[2] The *Notice* also requested comment on regulations to implement Section 10(c) of the Act, relating to cable operator-imposed restrictions on obscene and other types of program materials on the public, educational, and governmental access channels. We shall adopt regulations that implement section 10(c) in a subsequent *Report and Order*.

[3] We received comments, informal comments, reply comments, and informal reply comments. Those comments or reply comments filed after the prescribed deadlines shall be treated as informal comments. A list of all the commenters in this proceeding is provided in Appendix A.

services than do either broadcast viewers and listeners or telephone subscribers. According to Alliance, the statute and proposed rule are constitutionally infirm because the lockbox approach, rather than blocking, is the least restrictive means to achieve the government's purported aims.[4] Finally, Alliance argues that the statute cannot be justified as necessary since it is underinclusive and does not affect indecent programming on channels other than those used for leased access.[5]

4. Many access organizations filed comments in support of Alliance's comments, although these groups' comments were primarily focused on section 10(c)'s provisions applicable to the public, educational, and governmental access channels. Cable operators, in turn, maintain that section 10 is unconstitutional as to them. For example, Cox Cable maintains that section 10(a) impermissibly "deputizes"cable operators as censors. Operators also assert that other provisions of the new Cable Act and of the 1984 Cable Act (upon which section 10's requirements rest) are constitutionally infirm because, *inter alia*, they impermissibly restrict cable operators' first amendment rights.[6]

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[4] As described in section 624(d)(2) of the Communications Act, a "lockbox" or parental key is a device that enables subscribers to prevent viewing of particular cable services within their homes during periods selected by them.

[5] Alliance also challenges the constitutionality of section 10(c) of the Act because, *inter alia*, it allows cable operators, if they choose, to ban programming containing sexually explicit materials and materials soliciting or promoting unlawful conduct even though such materials are protected non-obscene materials and even though they may not be indecent. As noted above, matters directly pertaining to section 10(c) shall be addressed at a later date.

[6] This view is advanced by many cable operators, *e.g.*, TCI and Time Warner, and by both cable trade associations, NCTA and CATA. We do not address the constitutionality of other parts of the new cable Act as they are not directly at issue here and are not properly within the scope of the *Notice*.

Discussion

5. The courts have expressly recognized that activities of cable operators are affected with first amendment interests. *See, e.g., City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494-495 (1986). Congress, aware of the authority on this subject, has concluded that the provisions in section 10 governing cable activities are legally permissible. We are obligated to execute and enforce the provisions of section 10(b) of the Act as enacted by Congress.[7]

6. Moreover, we believe the constitutional challenges raised by the commenters are without merit. In *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), the Supreme Court, in upholding a ban on obscene telephonic communications but striking down a complete prohibition on indecent telephonic communications, expressly stated that "[t]he Government may [ ] regulate the content of constitutionally protected [indecent] speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." As discussed below, we believe these principles are fully applicable to indecent programming on cable television and that the regulations we adopt to implement section 10 satisfy these requirements.

7. At the outset, it is evident that a compelling state interest underlies section 10 and the implementing regulations. The compelling interest under section 10 is to reduce children's exposure to indecent materials.[8] The Supreme Court has unequivocally stated that the government's "interest in safeguarding

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[7] It is a well-rooted principle of law that "regulatory agencies are not free to declare an act of Congress unconstitutional." *See Meredith Corp. v. FCC*, 258 U.S.App.D.C. 22, 31 (D.C. Cir.1987); also *Johnson v. Robinson*, 415 U.S. 361, 368 (1974) ("Adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies").

[8] Section 10(b) expressly commands the Commission to promulgate blocking regulations that are "designed to limit the access of children to indecent programming."

the physical and psychological well-being of a minor 'is 'compelling,'" *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (*quoting Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982), and that "[t]his interest extends to shielding minors from the influence of [material] that is not obscene by adult standards," *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989); *see also FCC v. Pacifica Foundation*, 438 U.S. 726, 749-50 (1978). In addition, as discussed below, Section 10(b) and our regulations implementing the blocking approach prescribed by Congress therein are the least restrictive means necessary to limit children's access to such programming.

Permissibility of Regulating *Indecent Cable Programming*

8. A principal attack raised by commenters as to why the blocking approach in section 10(b) is impermissible is that the characteristics of cable distinguish it from certain other media in which regulation of indecent material has been upheld. According to the commenters, the courts have concluded that cable's differing characteristics preclude all government regulation of indecent programming on the cable medium. More particularly, they point out that regulation of indecent programming has been justified in the broadcast context primarily on grounds that broadcasting is a "uniquely pervasive" medium in society and "uniquely accessible to children,"[9] whereas some federal courts have found that these characteristics do not apply to cable television.[10]

9. We note that each of the federal court cases cited by the parties invalidated state or local laws or ordinances that attempted to impose *complete* bans on indecent programming on cable systems. Section 10(b), in contrast, does not ban such programming but merely requires that indecent programming on leased access be placed on a single channel so that unrestricted

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[9] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 748-749 (1978).

[10] *See Cruz v. Ferre*, 755 F.2d 1415 (11th Cir.1985); *Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985), *aff'd per curiam* 800 F.2d 989 (10th Cir. 1986); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982).

access by children can be prevented. It does not in any way unduly prevent adults from viewing indecent cable programming. In addition, in each of the cited cases, the state or local prohibitions were found to be overly broad in terms of the content sought to be restricted and thus stand in stark contrast to the narrow definition of indecency we have proposed and shall adopt today.[11]

10. These cited cases were also decided prior to Supreme Court's decision in *Sable Communications v. FCC*, 492 U.S. 115 (1989), which clearly indicates that regulation of indecent speech is permissible even though the medium is not broadcasting and, therefore, does not necessarily fit the exact blueprint the Supreme Court applied in *Pacifica* to broadcasting. Thus, the Court has not concluded -- or even suggested -- that indecency regulations, similar to those applied to the telephone medium, cannot be constitutionally applied to cable television. As *Sable* and its progeny indicate,[12] regulation of indecent matter on other forms of expression is constitutionally permissible provided that it meets the "compelling government interest" test and is "carefully tailored."

11. Further, those federal decisions that have invalidated indecency prohibitions on cable have rested in part on the premise that "cable is not an intruder" into the home, but rather "an invitee whose invitation can be carefully circumscribed," *e.g.*, by lockboxes. *See Community Television of Utah, Inc.*, 611 F. Supp. at 1113. These decisions thus do not suggest that the government is precluded from imposing regulations that are intended merely to enable customers to "tailor the invitation"even more carefully -- such as by blocking mechanisms designed to protect children in the home. Finally, even though cable is not now the universal service

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[11] *See also Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (statute prohibiting distribution by wire or cable any pornographic or indecent material to subscribers held unconstitutionally overbroad).

[12] *See Dial Information Services v. Thornburg*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 966 (1992) and *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir. 1991).

the telephone medium is, nor, as yet, as pervasive as broadcasting in our society, we note that over 60 percent of television households in this country now subscribe to cable.[13] As pointed out by Alliance, approximately 30 million of these homes are provided with an access channel. These figures will undoubtedly increase in the years to come. It would thus seem that blocking is a reasonable, appropriate means to protect the well-being of children in the substantial number of households that now subscribe to cable services. In our view, therefore, the decisions cited by the commenters do not render section 10(b) blocking *per se* unconstitutional.

Least Restrictive Means

12. The other principal attack raised by the parties is that even if government regulation of indecent programming on cable television is permissible, "blocking" as required under the statute is not the least restrictive means to achieve the government's compelling interest. Instead, in these commenters' view, the least restrictive and more effective means would be the existing lockbox approach authorized by Congress in section 624 of the Communications Act, which does not require that programming be identified by a program provider as indecent and placed on a single blocked channel. They believe that without record evidence that lockboxes are ineffective, other blocking mechanisms, alleged as more restrictive, cannot be adopted.

13. At the outset, we note that in *Dial Information Services v. Thornburg*, 938 F.2d 1535 (2nd Cir. 1991), *cert. denied* 112 S. Ct. 966 (1992), the court expressly held that "blocking" mechanisms authorized by section 223 and implemented by the Commission were the least restrictive means to achieve the government's compelling interest to reduce children's access to indecent communications on the telephone medium. In that case,

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[13] Cable television is available nationwide to 89.4 million homes. Out of a total of 92.1 million television households in the United States, there are approximately 55.7 million cable subscribers. *Broadcasting* at 79 (Jan. 11, 1993).

the court reversed the district court because it had erred "in focusing on means, when the focus should be on goals as well as means" in its finding that "voluntary blocking of indecent telephonic communications was the least economically restrictive and therefore the most desirable means of regulation." *Id.* at 1542. The court emphasized that "the means must be effective in achieving the goal" and concluded that "[v]oluntary blocking simply does not do the job of shielding minors from dial-a-porn." *Id.*[14] A similar decision was reached by the federal appellate court in *Information Providers' Coalition v. FCC*, 928 F.2d 866 (9th Cir.1991). Moreover, the courts in these and earlier cases were fully aware that voluntary approaches, similar in principle to the lockbox approach, were available to telephone subscribers who wished to preclude the use of their phones for outgoing calls to specific numbers. The blocking approaches adopted by the Commission were nevertheless specifically sanctioned as the least restrictive effective means to achieve the government's interest.[15] The blocking scheme upheld in these cases is, in all relevant

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[14] The court was explicit in its rejection of the lower court's finding: Even if voluntary blocking is assumed to be the least restrictive means of accomplishing the congressional purpose, it clearly is not an effective means. 938 F.2d at 1542.h

[15] *See Dial Information Services v. Thornburg*, at 1542 ("voluntary blocking would not even come close to eliminating as much of the access of children to dial-a-porn billed by the telephone company"); *Information Providers' Coalition v. FCC*, at 873 ("The Commission concluded that voluntary blocking would not be an effective means of limiting minors' access to dial-a-porn services. We are satisfied that substantial evidence supports this finding and will not disturb it on review."). *See also Carlin Communications v. FCC*, 837 F.2d 546, 546 (2d Cir.1988) ("The Commission bore its burden of showing that the compelling government interest in protecting minors from obscene telephone messages could not be served by less restrictive means. It adequately considered the feasibility and costs of customer premises blocking equipment").

respects, identical to that required by section 10(b).[16] Thus, we have no reason to question the constitutional permissibility of requiring blocking as a means to prevent children's access to indecent materials.

14. We further note that Congress itself has not suggested that a voluntary lockbox approach is the most effective means to prevent children's access to indecent programming. Even though under the 1984 Cable Act, Congress explicitly authorized a lockbox approach to enable subscribers to control access by others within their household to programs appearing on certain cable channels, it did not rule out the possible use of other methods. It merely stated, at the time, that section 624 provides "*one method* for dealing with obscene or indecent programming," H.R.Rep No. 934, 98th Cong., 2d Sess. at 70 (1984) (emphasis added), and said that this requirement "provides *one means* to effectively restrict" access to minors and others, *id.* (emphasis added). In section 10(b) — just as it did in section 223 relating to "dial-a-porn" telephone services — Congress has now determined that mandatory, not voluntary, blocking is essential in effectively protecting children from indecent programming on leased access channels.

15. We agree with Congress' conclusion that the voluntary lockbox approach is not likely to be as effective as cable operator-blocked channels. Moreover, we believe it may have other drawbacks. On leased access channels, for example, programs may come from a wide variety of independent sources, with no single editor controlling their selection and presentation. As a

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[16] Under section 10(b), the cable operator, not the cable subscriber, is required to "block" access to the leased access channel carrying indecent programming just as, under section 223, it is the telephone common carrier, not the telephone customer, that is required to "block" access to telephone lines carrying indecent dial-a-porn messages. Moreover, just as under section 223, a telephone common carrier must in essence segregate telephone lines carrying indecent telephonic messages from others, under section 10(b), cable operators are required to segregate through use of a separate channel indecent leased access programming from the non-indecent programming.

consequence, on these channels, indecent programming may be especially likely to be shown randomly or intermittently between non-indecent programs. Subscribers would thus be required to manually install, activate, and deactivate these devices in an attempt to avoid exposure of their children to such programming, and, even if children were carefully supervised, such attempts would not always be successful.[17] The alternative for such subscribers would be to attach the lockboxes on a permanent basis and to forbear receiving leased access programming entirely.

16. On the other hand, by separating indecent from non-indecent programming and the use of blocking mechanisms, the invitation of cable "as an invitee" can be more "carefully tailored." Subscribers can better protect their children and will not be required to forego entirely (for themselves and their children) receipt of all leased access programming simply in order to avoid possible exposure of children to indecent programming on these channels. The blocking approach thus enhances the rights of viewers to have access to leased access programming and the rights of programmers to reach their intended audiences.

17. In summary, we do not believe the blocking mechanism required by section 10(b) and incorporated in our rules, suffers from constitutional defects. Cable television, like the telephone and other services, may well be viewed as an invitee into an individual's home. Existing law, however, would not appear to preclude that invitee's invitation from being carefully tailored to ensure that the invitee does not overstep the bounds of its invitation in a harmful fashion.

Alleged "Underinclusiveness"

18. Alliance also contends that section 10(b) and the proposed implementing rule are unconstitutional because they affect only access channels and do not address the "entirety" of the

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[17] As the Supreme Court stated in *Ginsberg v. New York*, 390 U.S. 629, 639 (1962), parents and others "who have the primary responsibility for children's well-being are entitled to the support of laws designed to aid the discharge of that responsibility."

problem of indecent programming in the cable medium. Thus, they contend, the claim that the blocking requirement is justified by a compelling interest is undermined, and, hence, the statute and rule are unconstitutional.

19. We disagree. As the Supreme Court recently has made clear, the first amendment imposes no "underinclusiveness" limitation but a "content discrimination" limitation upon the government's prohibition of proscribable speech. The purpose of the prohibition against content discrimination is to ensure that the government may not effectively drive certain ideas or viewpoints from the marketplace.[18] The section 10(b) blocking requirement, of course, does not proscribe speech at all, but merely requires that indecent programming be placed on channels that subscribers must request in order to obtain access. Thus, there is no danger that section 10(b) and our rule will drive ideas or viewpoints from the market.

20. Further, there is no basis for a conclusion that the statute is intended to protect only certain ideas or viewpoints or that official suppression of ideas is afoot.[19] Rather, Congress has determined that some restrictions on the subclass affected by the statute are justified because of the risk of harm to children from indecent programming. Congress thus has merely directed its attention to the specific area where a problem has been identified.[20] It was not required to legislate in other areas where

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[18] *See R.A.V. v. City of St. Paul, Minnesota*, 112 S. Ct. 2538, 2545 (1992).

[19] *Id.* at 254.

[20] Senator Helms stated that the purpose of these provisions is "to forbid cable companies from inflicting their unsuspecting subscribers with sexually explicit programs on leased access channels," noting that "leased access channels are not pay channels, they are often in the basic cable package." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992). Alluding to a specific example of leased access in Puerto Rico, he pointed out that "[t]he situation is likewise out of hand in New York and other States," and (continued...)

no problem of similar degree or magnitude has been found. Given the evidence before Congress concerning the egregious nature of the problems associated with some leased access programming, legislative action was deemed appropriate.[21]

Constitutionality of Section 10(a)

21. In addition to challenging the constitutionality of the section 10(b) blocking approach, Alliance also asserts that section 10(a) is unconstitutional because it permits cable operators to ban completely indecent programming on leased access channels. Although Alliance recognizes that such complete bans are permissible by private parties, Alliance contends that access channels in fact are "public forums" and thus that government action has been taken that implicates the first amendment.

22. We are not aware of any federal decision, including those cited by Alliance, that have directly addressed the question or held that cable access channels are public forums as that term has been defined for the purpose of first amendment analysis. Moreover, the communications facilities and services used by cable operators to provide commercial leased access are analogous in function and purpose to those provided by communications common

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[20](...continued)

read from one subscriber's letter in which she described how she and her daughter were subjected to "verbal and visual violation just by accidentally pushing the wrong button" and seeing "a couple engaged in oral sex." *Id.* We also note that, to the extent cable operators themselves may provide indecent or "adult" programming, such programming is more likely than not to be provided on per-program or per channel services that subscribers must specifically request in advance, in the same manner as under the blocking approach mandated by section 10(b).

[21] Congress, we note, is not prohibited from legislating restrictions directed to the most patently offensive programming, if it concludes that the risk of children's exposure to such materials is significantly greater on leased access channels than elsewhere. *Cf. R.A.V. v. City of St. Paul, Minnesota* 112 S. Ct. at 2546 (A state might choose to prohibit only that obscenity which involves the most lascivious displays of sexual activity).

carriers. Similarly, we are not aware of any federal court decision that has held, upon constitutional grounds, that communications common carriers operate as public forums. To the contrary, existing case law has explicitly held that the activities of public utilities, such as telephone common carriers, do not constitute state action that would, for first amendment purposes, prohibit such carriers from engaging in content-based discrimination.[22] For similar reasons, we do not believe that the activities of cable operators when they engage in the provision of commercial leased access can be construed as constituting state action.

23. Therefore, to the extent that Alliance and the other parties' comments are directed at the constitutionality of the statute and our implementation thereof, they are rejected.[23] As noted above, in implementing these statutory provisions, we shall to do so in a manner that best protects the constitutional interests of all concerned.

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[22] *See, e.g., Sable Communications v. FCC*, 492 U.S. at 131 (Scalia, J. concurring) ("[W]e do not hold that the Constitution requires public utilities to carry [dial-a-porn]"); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358-59 (1974) (carriers are private companies, not state actors); *Information Providers' Coalition v. FCC*, 928 F.2d at 877 ("a telephone carrier may [ ] ban 'adult entertainment' from its network"); and *Carlin Communications v. Mountain States Telephone and Telegraph*, 827 F.2d 1291, 1297 (1987), *cert. denied*, 485 U.S. 1029 (carrier is under no constitutional restraints in its policy of barring all "adult" entertainment from its 976 network). *Carlin* also disposes of Alliance's alternative claims that a cable operator's decision to ban indecent programming constitutes state action or an unlawful prior restraint simply because the cable operator potentially could face liability if it carries obscene programming. *See id.* at 1297 n.6 (the pressure of an obscenity law and resulting self censorship is not an unlawful prior restraint).

[23] Alliance and others also challenge the constitutionality of specific aspects of the statute or our implementation of them. We shall address these arguments below in the context of the specific provisions and requirements of the statute.

III. Compliance with Administrative Procedure Act (5 U.S.C. § 553) Requirements

24. Alliance maintains that the rights of the public have been prejudiced because the *Notice* and/or proposed rule fails to: articulate purposes that would be served by rule; present record evidence of the existence of a problem; present its reasoning on how the alleged problem would be remedied; include a complete description of subjects and issues involved; set forth standards describing the range of alternatives being considered with reasonable specificity; set forth any certification requirement in the proposed rule or a formulation of specific procedures to resolve access disputes or the blocking mechanisms or procedures that might be adopted. Alliance states that the Commission should issue a second notice of proposed rule making and allow a second round of comment. Although not objecting to the adequacy of the *Notice*, MPAA agrees that an additional round of comment is necessary in light of the "extraordinary constitutional delicacy of the issues at hand."

25. We disagree. The Administrative Procedure Act requires an agency to give advance warning of proposed informal rulemaking by publishing a notice containing "either the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). The Act, however, "does not require an agency to publish in advance every precise proposal which it may ultimately adopt as a rule." *California Citizens Band Association v. United States*, 375 F.2d 43, 48 (9th Cir. 1967); *Spartan Radiocasting Co. v. FCC*, 619 F.2d 314 (1980). Given the statutory constraints involved, we believe the *Notice* amply articulated the purposes intended to be served by the rule, *see* paras. 5-9 (limiting children's access to indecent programming) and provided the public an adequate description of the subjects and issues involved (*see* paras. 1-2 relating to "no censorship" and removal of cable operator immunity for obscene programming on access channels and paras. 13-14 relating to and ranging from interpretation of statutory terms to whether cable operator use of certifications would be appropriate). We believe that the *Notice* adequately set forth and elicited comment on the proposals relating

to certification,[24] resolution of access disputes, and blocking mechanisms. Indeed, extensive comments on these and other issues were in fact submitted. Accordingly, we reject Alliance's arguments that the *Notice* did not comply with the APA.

IV. Section 10(a) — Implementation by Cable Operator of a Written and Published Policy Of Prohibiting Indecent Leased Access Programming

26. Section 10(a) amends section 612(h) of the Communications Act, 47 U.S.C. § 532(h), governing commercial leased access, to permit a cable operator to enforce a "written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

27. Cable operators contend that they should have broad discretion regarding the manner in which they implement section 10(a) of the Act. For example, Acton states that the operator should have broad discretion (including, for example, the right to prescreen) in selecting and enforcing its implementing policy and that a cable operator's decision should not be subject to challenge as long as its decision is based on a "reasonable belief" in accordance with the statutory language. NCTA submits that a cable operator should be able to prohibit programming under the "reasonable belief" standard if the operator's belief is based on its review of programming or the operator's receipt of certification from a programmer that the program is not indecent. CATA argues that, just as programmers are required under section 10(b) of the statute to notify the cable operator of indecent programming to be blocked, so too should they be required to notify the cable operator as to whether the program is indecent under section 10(a). TCI

[24] The fact that certification is discussed in the *Notice* as a possible option but is not reflected in the proposed rule appended to the *Notice* does not, contrary to Alliance's assertions, render the rulemaking proceeding invalid.

asserts that the absence of specificity in section 10(a) would appear to signal Congress' intent to afford cable operators' discretion to establish the form and manner of publication of their policies.

28. Denver Access, on the other hand, is concerned that too much leeway provided under section 10(a) will cause cable operators to curtail leased access programming because no standard of reasonableness is required for removal or attachment of conditions to leased access services. Indeed, Denver emphasizes that the self-effectuating provisions of section 10 (and presumably, how they are interpreted and/or enforced) are crucial to leased access program providers and, therefore, the Commission's role in overseeing this part of the statute is vital.

Discussion

29. We are convinced by the language of section 10(a), especially when read in conjunction with section 10 as a whole, that Congress intended to provide cable operators wide discretion to determine the manner in which they may enforce a policy of prohibiting indecent leased access programming, without involvement by this Commission. Section 10(a) expressly states that a cable operator's determination to classify programming as indecent should be based on the operator's "reasonable belief," thereby according the operator wide discretion. Furthermore, in conspicuous contrast to both sections 10(b) and (c), section 10(a) does not require, or grant specific authority to, the Commission to implement its provisions.

30. Moreover, it is clear that Congress did not wish under section 10(a) to compel cable operators to serve as government surrogates and prohibit this type of programming on leased access channels. This is evident from the legislative history of the provision, which reveals Congress' explicit intention to ensure that the imposition of any such prohibition by cable operators would be voluntary, not mandatory, and its concern that cable operators not

be compelled to act as involuntary government surrogates.[25] The legislative history thus makes clear that cable operators are free to decide whether to prohibit indecent programming on these channels — the very same freedom they enjoy with respect to the other channels not subject to access requirements.

31. Cable operators thus need not prohibit indecent programming but are free to ban such programming on their leased access channels as long as they have a written and published policy and, in enforcing any such prohibition, exercise their reasonable belief about which programming is or is not indecent. Section 10(a) would also appear to permit cable operators to adopt any measures appropriate for implementation including, but not limited to, the requirements we adopt under section 10(b), subject to the caveat in section 612(c)(2) that prohibits them from exercising editorial control over leased access programming in any other respects.[26] Further, some cable operators suggest that cable operators have the discretion to prohibit some, but not necessarily all, indecent programming under section 10(a) as long as they block the rest under section 10(b). Given the wide discretion Congress

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[25] Senator Helms, author of this amendment, emphasized that cable operators' actions prohibiting indecent material on leased access channels "is not governmental action" but rather "action taken by a private party." 138 CONG. REC S646 (Remarks of Senator Helms daily ed. Jan. 30, 1991). He further pointed out that the "pending amendment merely gives cable operators the legal right to make that decision" but "does not require cable operators to do anything." *Id.* Even though the view of a sponsor of legislation is by no means conclusive, the Supreme Court has indicated that it is entitled to considerable weight, particularly in the absence of a committee report. *North Haven Board of Education v. Bell*, 451 U.S. 512, 526-527 (1982).

[26] Thus, a cable operator who makes its written policy available to users on request, places it in its public file, and furnishes it to the franchise authority would appear to satisfy the requirement of having a "written and published policy," as Blade Communications suggests. Similarly, this provision would not appear to preclude cable operator reliance upon a user's certification as the basis for its "reasonable belief," as NCTA suggests. *See* discussion at para. 50 and note 42, *infra*.

afforded cable operators under this section, we see no reason to dispute this interpretation.[27] Because Congress appears to have deliberately omitted any role for the Commission in the implementation of this particular provision of section 10 and because programmers are otherwise allowed, under existing statutory provisions, to enforce their rights to commercial leased access in federal district courts,[28] we conclude that the courts, rather than this agency, are the appropriate forums for resolution of any disputes concerning whether cable operators have properly denied access pursuant to section 10(a).

V. Section 10(b) — Implementation of Blocking Requirement Applicable to Indecent Programming

32. Section 10(b) amends section 612 of the Communications Act of 1934 (47 U.S.C. § 532) by adding new subsection (j)(1) which requires the Commission to promulgate regulations designed to: limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

> (A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;
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> (B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and
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> (C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

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[27] *See also* para. 43, note 39, *infra*.

[28] *See also* subsections 612(d) and (e)(1).

Subsection (j)(2) requires cable operators to "comply with the regulations promulgated pursuant to paragraph (1)."

Thus, this provision requires cable operators to place indecent programming, as defined by the Commission, and as identified by program providers, on a single channel and to block access to this channel unless the subscriber affirmatively requests access to the channel in writing. In the paragraphs below, we discuss implementation of the various components of this provision.[29]

A. Definition of "Indecent Programming"

33. Congress set forth in section 10(a) a definition of indecency to be used by cable operators that voluntarily choose to prohibit indecent programming on the leased access channels. The statutory definition is virtually identical to the Commission's generic definition of indecency and differs only insofar as we have tailored the definition to the particular medium involved.[30] In the *Notice*, we pointed out that, unlike in section 10(a), Congress in section 10(b) delegated to the Commission the task of defining an indecency standard for programming that programmers must identify and cable operators must block.

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[29] Many of the parties submitted comments concerning which persons or entities should be required to bear the costs and expenses under the cable operator-imposed policy under section 10(a) as well those costs and expenses arising from implementation of blocking mechanisms under section 10(b). We believe these issues are more appropriately addressed in the cable rate regulation proceeding in *Notice* of Proposed Rulemaking in MM Docket No. 92-266, FCC 92-544 (adopted December 10, 1992; released December 24, 1992). and thus will be taken up therein.

[30] Senator Helms, author of section 10(a), pointed out that "[t]his definition is exactly the same as the FCC definition." 138 CONG. REC. S646 (Remarks of Senator Helms daily ed. January 30, 1992). He further added that the term indecent had recently withstood constitutional challenge in the *Dial Information Service* case because the court held that it was "sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs." *Id.* (citation omitted).

34. We proposed, for the purpose of implementing section 10(b), to use the definitional language of section 10(a) — i.e., indecent programming would be defined as programming "that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." We noted that this language is patterned after the generic definition of indecency found in the standards we have applied to broadcasting and the telephone medium.[31] Just as we have previously tailored our indecency standard to the specific medium involved, we asked whether we should make the definition specifically applicable to the "cable medium."

35. Many of the commenters state that, if the Commission decides that an indecency standard is applicable to cable, the Commission's proposed definition would be appropriate since it would comport with the indecency definition in section 10(a) and parallels the Commission's other indecency definitions. This is particularly important, according to NCTA, because, if the Commission's definition under section 10(b) were broader than that under section 10(a), then the cable operator would be in the "untenable" position of being forced to block programming which it is not able to prohibit under section 10(a).

36. In addition, NCTA and others believe that the Commission should tailor its standard to the "cable medium" because such a step would minimize difficulties by giving the term a narrow definition. Relating to this question, Blade Communications states that the definition should be refined by stating that the relevant community for cable should be cable subscribers and, indeed, further suggests that the definition should be further refined to subscribers of a particular tier or channel. Time advocates adoption of a community standard that is based on the "average cable subscriber" on a nationwide basis, as the

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[31] *See Infinity Broadcasting Corp.*, 3 FCC Red 930, 936 n.6 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) and *Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-1541 (2d Cir. 1991).

Commission has done on the broadcast side. In addition, it states that material should be judged within the context of the whole program and that merit of the work should be considered. Intermedia states that if the Commission is to make the definition workable, it must establish a national standard that preempts state prosecution of programmers and operators. Many of the reply commenters reiterate the importance of adopting a nationwide standard based on the "average cable subscriber."

Discussion

37. We shall adopt our proposed definition of indecent programming. As we pointed out in the *Notice*, the Supreme Court stated in FCC v. Pacifica Foundation, 438 U.S. 726, 748 (1978), that "each medium of expression presents special First Amendment problems." Our definition thus shall be suitably tailored to include reference to the cable medium, just as our generic definition has been adjusted to other media. In addition, we agree with Time that the standard should be based on the "average cable subscriber,"[32] just as our indecency standard for broadcasting is based on the "average broadcast viewer or listener."[33] In addition, for purposes of our definition, "average cable subscriber" shall mean the "average subscriber to cable television," rather than the average subscriber to a particular cable system or average subscriber in a particular locality.[34] Keeping in mind that the purpose of "indecency" regulation is to protect children from exposure to such materials, we believe that this interpretation, not confined to a

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[32] We decline to adopt Blade Communications' proposal that application of the indecency standard should also take into account particular

[33] *See Infinity Broadcasting Corp.*, 3 FCC Red 930, 933 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 f.2d 1332 (D.C. Cir. 1988).

[34] This approach was strongly supported by the commenters.

specific geographical area or specific cable system, is reasonable and appropriate.[35]

38. We do not agree that any determination of indecency made under the standard is required take into account the work as a whole. As the court in *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 (D.C. Cir. 1988) stated, "some material that has significant social value may contain language and descriptions as offensive . . . as material lacking such value." Thus, while "merit is a relevant factor in determining whether material is patently offensive," it "does not render such material per se not indecent," since the object sought is to reduce the risk of children's exposure to such materials. *Id.* Of course, as we have reiterated on many occasions, "context" is an important factor of the indecency equation and, to the extent that the overall work as a whole is relevant to the question of "context," it will be considered.[36]

B. Identification by Program Providers of Indecent Programming

39. Section 10(b) directs the Commission to adopt regulations that require cable operators to block access to indecent programs "as identified by program providers." In the *Notice*, we noted that it is the program provider, not the cable operator, who must determine if a program is indecent and, therefore, must be placed on a blocked channel. We pointed out that the cable

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[35] On the broadcast side, we have noted that the Supreme Court does not require, as a constitutional matter, the use of any precise geographic area in evaluating obscene or indecent material. *Hamling v. United States*, 418 U.S. 87, 104-05 (1974), and we have stated that "the determination reached is not one based on a local standard, but one based on a broader standard for broadcasting generally." *Infinity Broadcasting Corporation of Pennsylvania*, 3 FCC Rcd 930, 933 (1987), *remanded on other grounds Action for Children's Television v. FCC*, 852 F.2d 1332 (1988). We believe that similar considerations are applicable here.

[36] *See, e.g., Infinity Broadcasting corp., supra.*

operator is prohibited under section 612(c)(2) of the Communications Act from exercising editorial control over the leased access channels (unless under section 10(a) of the new Act it enforces a written and published policy that prohibits indecent programming). We expressed the view that, under these provisions (and in the absence of a policy authorized by section 10(a)), the cable operator might not have the power to require placement of indecent programming on the blocked channel if the program provider fails to identify the program as indecent or fails to notify the cable operator to that effect.

40. Most commenters, primarily cable operators, agree that producers or programmers should have primary, if not the sole, responsibility to identify programming since they have the best knowledge of the programming. NCTA and several cable operators state that cable operators should not be responsible for the underlying content of such programs but only for failure to block if proper notification is given, unless the operator has actual knowledge that the program is indecent. Others, such as Intermedia, state that because cable operators are also liable for obscene programming, they should be permitted to review or prescreen if they so choose. MPAA, in reply comments, states that lessees should be permitted, but not required, to provide written notice of any programming they believe may be found to be "indecent" by simply requesting carriage on a "blocked" channel.

Discussion

41. The legislative history to section 10 indicates clearly that Congress deliberately chose to pattern this section on the statutory scheme applicable to information providers of indecent materials over common carrier telephone facilities. Senator Helms, the amendment's author, stated that "this [blocking scheme] is precisely the same method that Congress used to block dial-a-porn lines" and has been upheld against constitutional challenge.[37]

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[37] *See* 138 CONG. REC. at S646 (daily ed. January 30, 1992).

42. Under the telephone blocking scheme upon which section 10(b) is based, it is the information provider, not the telephone common carrier, that is required to identify whether the information to be transmitted is indecent. *See Report and Order in the Matter of Regulations Concerning Indecent Communications by Telephone Gen. Docket No. 90-64*, 5 FCC Rcd 4926, 4931 (1990). In adopting implementing regulations in the telephone context, we expressly stated that such a requirement imposes merely a minimum burden on the information provider and obviates the need for the carrier to monitor the communication.[38]

43. Similarly, the statutory language of section 10 expressly requires the program provider, not the cable operator, to identify whether a program is indecent and therefore is subject to the blocking requirement. Given this statutory directive, we do not believe section 10(b) requires cable operators to prescreen or review programs on the leased access channels for this purpose.[39] Cable

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[38] As noted above, the statutory scheme that governs indecent telephone communications was upheld against constitutional challenge in both *Dial Information Services* and *Information Providers' Coalition*. In the latter case, the court rejected a claim that the indecency identification requirement is an impermissible "prior restraint," stating that "labelling matter as indecent under the statute or regulation does not inhibit its dissemination one iota" 928 F.2d at 878. The court further stated that if regulation of indecent matter is constitutionally permissible, "it inexorably follows that for some regulation of indecent speech to occur, the speech must be identified as indecent." *Id.*

[39] Similarly, we do not believe that section 10(b) itself authorizes cable operators to prescreen. Cable operators may, if they choose, prescreen programming as a means to enforce any cable operator policies adopted under authority of section 10(a). Further, we believe that cable operators with policies prohibiting indecent programming have, under section 10(a), the discretion to block any such programming, rather than banning it completely, and, moreover, they may provide such programming on blocked channels during time periods of their own choosing. In addition, wholly apart from the provisions of sections 10(a) and 10(b), we think that prescreening by cable operators cannot be prohibited in light of the

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operators thus will not be held liable under section 10 or our rules for their failure to block programming where program providers have failed to provide the required identification of programming that is indecent. Moreover, given the explicit statutory language requiring programmer identification as a prerequisite to the cable operator's blocking obligation (which signifies Congress' clear intention to limit the responsibility of cable operators), a cable operator will not be subject to liability under section 10(b) even if it has a contrary belief that a program not identified by a program provider is indecent. As discussed in para. 75, *infra*, programmers who violate our rules by failing to identify indecent programming will, of course, be subject to appropriate sanctions.

C. Certification

44. In the *Notice*, we asked, in conjunction with the identification requirement, whether a cable operator can require program providers to certify that their programming is not indecent or obscene. We assumed that all cable operators could require program providers to certify that their programs do not contain obscene materials.[40]

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[39](...continued)

amendment to section 638 that removes a cable operator's statutory immunity for obscene programs on cable access channels. As noted *infra*, however, we believe that cable operators that do not prescreen and thus do not have actual knowledge of any obscene programming on leased access channels, are otherwise immune from prosecution for violations of obscenity laws.

[40] As we pointed out in the *Notice*, section 10(d) of the new Cable Act removed cable operators' statutory immunity under federal, state and local laws for "programming involving obscene materials" on access channels. We agree with Alliance to the extent that it suggests that the language in section 10(d), if read literally, may be too broad to satisfy constitutional standards. The language in 638 should thus be construed to remove immunity only for provision of programming that is unprotected by the first amendment.

45. The majority of commenters supported use of a certification procedure, although some differed as to details that should apply to this process. Other commenters were concerned that requiring certifications could discourage or curtail presentation of live programming on access channels. To alleviate such concerns, NATOA urged the Commission to allow programmers of live formats to certify that they have exercised "reasonable efforts" to ensure that their programs will not contain obscene or otherwise proscribed material. Acton, TCI and Time believe that NATOA's suggestion is reasonable. Some cable operators favor a certification process because it is the least intrusive means of implementing section 10(b). For example, Continental Cablevision argues that, without certification, operators will be forced to adopt a written and published policy and, if so, this could lead to a *de facto* ban on indecent programming. Other cable operators who favor certifications argue that their use should not preclude operators from prescreening or otherwise monitoring programming on the leased access channels.

46. Denver Access, one of the few to express reservations about a certification process for leased access use, argues that certifications can be used in a highly and unnecessarily repressive manner and, therefore, the FCC should permit certifications only under conditions it prescribes and monitors. NATOA states its support for a certification system because it believes that cable operators should not be permitted, must less required, to censor programming. MPAA, in its reply comments, states that lessees should not be required to "certify" that programming is "indecent but, as noted previously, merely request carriage on the blocked channel.

47. Cable operators state that they should be released from liability for carriage of leased access indecent or obscene programming where a programmer has certified that the programming is not obscene or indecent. However, they differ as to the precise form of nonculpability that should attach. For example, some suggest no liability at all in such cases and, therefore, no prosecution at the federal, state, or local level. Others suggest that an affirmative defense should be available or that

common law defenses should be available to operators. For example, TCI asserts that there should be an irrebuttable presumption of no knowledge by an operator if a programmer certifies that programming is not indecent or obscene because Congress clearly removed from cable operators an obligation to make independent judgments about programming.

48. Cable operators thus suggest that they should not be held liable for the underlying content of the programs but only for their failure to place programming on blocked channels upon receipt of proper notification. They are almost unanimous in their views that unless they are protected by a certification process, they will be forced to prescreen and censor programming on the leased access channels. Some also suggest that they should have the right to prescreen even if a certification process is adopted, since they are now liable for carriage of obscene materials. Others suggest that they should be permitted to impose reasonable conditions on carriage of programming on leased access channels, including indemnification provisions. Some assert that they should be permitted to deny carriage to a program provider whose certification was false and some maintain they should be permitted to assess monetary penalties. In their view, those who refuse to certify should be denied access.

49. On the other hand, Alliance maintains in reply comments that certification is not necessary to insulate operators from liability, even for obscene programming. Rather, the Commission should state in its final rule that no liability will attach to an operator if a programmer violates both the Commission's rule (by failing to identify indecent programming) and an operator's policy against indecent programming. According to Alliance, there is "simply no need for the Commission to require that programmers certify the content of their programs." As to obscene programming, Alliance points out that, in accordance with Commission precedent governing MDS common carriers, no liability should attach for that programming either, unless a cable operator had actual knowledge that the programming has been adjudicated obscene. In addition, it maintains that a certification requirement might very well be considered vague and, therefore, incapable of withstanding first

amendment scrutiny, to the extent that it can be likened to an oath and has the effect of chilling speech by forcing self-censorship. Along this line, MPAA, in reply comments, states that requiring program providers to "certify" in writing would violate the Constitution's fifth amendment.

Discussion

50. As indicated above, we think that cable operators can use certification procedures as a means to enforce any policies prohibiting indecent programming that may be established under section 10(a). We further believe that requiring certification is permissible under section 10(b). We will, therefore, permit cable operators to require certification of program providers relating to both indecent and obscene programming on the leased access channels.[41] Although some commenters state that certification would be burdensome and would serve as a further deterrent to those seeking to use these access channels, we believe that a relatively simple, straightforward certification requirement need not have either of these deleterious effects. Further, certification serves as a reasonable means to avoid any questions that might otherwise arise concerning a cable operator's potential liability under our rules and section 10(b) for failure to block indecent programming identified by program providers. In addition, such a requirement is reasonable since cable operators are no longer statutorily immune from liability for obscene materials carried on leased access channels.[42] We thus believe this approach strikes an

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[41] Certification does not remove a cable operator's independent right to prescreen, as addressed in note 39, *supra*.

[42] We agree with Alliance, that under prevailing law, cable operators should be held immune from liability where they do not have actual knowledge of leased access use for carriage of obscene programming. Permitting a certification requirement would further assist a cable operator in defending against any potential prosecution. We also believe that Congress, through enactment of section 10, clearly intended that its legislative scheme would prevail over any state or local laws that attempted to prohibit or otherwise regulate indecent programming on leased access

(continued...)

appropriate balance between the cable operator's rights and obligations under section 10(b) and (d) and the access provisions of section 612(c)(2).

51. Accordingly, we will allow cable operators to require program providers to certify that their programming is not obscene or indecent or, alternatively, to identify the programming that is indecent and required to be blocked.[43] Further, a program provider that does not provide a requested certification for its

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[42](...continued)

channels. Even prior to enactment of section 10, section 612 of the Communications Act was expressly held to preempt state law that prohibited indecent programming on these channels. *See Community Television of Utah v. Wilkinson*, 611 F.Supp. 1099, 1103 (D.Utah 1985), *aff'd Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986). With section 10's enactment it is even more clear that Congress intended that the clearly defined scheme in section 10(b) should prevail and thus preempt any state laws that otherwise might govern indecent programming on access channels. We therefore interpret section 10(b) of the Act as immunizing cable operators and programmers from liability for indecent programming where they have complied with the section 10(b) requirements.

[43] We do not believe that any certification requirements imposed by cable operators impermissibly violate program providers' rights under the first amendment, as Alliance maintains, or the fifth amendment's "self-incrimination" clause if required in writing, as MPAA contends. Moreover, even assuming some state action were involved, requiring a certification would not constitute a prior restraint on speech and thus would not implicate any first amendment concerns. *See Information Providers' Coalition v. FCC*, 928 F.2d at 878. At the outset, we note that our rules will not require cable operators to use a certification procedure, but simply will permit them to do so. Further, program providers do not incriminate themselves by certifying that their programming is not obscene or indecent. Nor do they do so by identifying programming that is indecent for purposes of its provision on blocked channels, as they face no potential liability under state or federal law for the provision of indecent programming on blocked channels. *See* note 42, *supra*, concerning preemption of state laws governing indecent programming on blocked channels.

programming will not be entitled to leased access. As suggested by NATOA and endorsed by others, program providers of live programming will be permitted to certify that they have exercised reasonable efforts to ensure that their program are not obscene (or indecent if provided on a non-blocked channel). As stated above, where a program provider's certification that its program is not indecent is erroneous and the program is not blocked out by the cable operator, the cable operator will not be in violation of our rules and the statute.[44]

D. Basic Requirements

1. Contents of Certification

52. Commenters suggested different approaches regarding implementation of a certification process. Some argue that the FCC should specify the form or the content of the certification that may be required of the programmer. New York State states the Commission should require more than a conclusory statement by program providers. TCI suggests that the Commission should allow

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[44] Further, as indicated in note 42, *supra*, such cable operators (or programmers) in compliance with section 10(b) are not subject to state laws regarding indecency, which are preempted by the Cable Act's explicit provisions governing indecent programming. Further, where a certification is erroneous, we believe cable operators would also be immune from potential liability under obscenity laws. *See* notes 39 and 42, *supra*.

We will not deny cable operators the right to request indemnification from leased access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program, certified otherwise by a leased access provider. Notwithstanding some commenters' contentions, this is a reasonable term and condition relating to use of leased access channel capacity in light of the removal by congress in amended section 638 of cable operator immunity for carriage of obscene programming.

certification procedures to be handled contractually by the parties. Commenters generally said that certification should be in writing.

Discussion

53. We decline to specify the precise wording that should be contained in a requested certification. However, for purposes of qualifying as a certification under our rules, we shall require that the certification be made in writing by the program provider. Certification must be made by the person or entity assuming responsibility for the program's content. Thus, certification by an access organization or entity responsible for management of the commercial leased access channels is sufficient if that organization or entity assumes responsibility for the content of the programs intended for commercial leased access. Further, the certification should include the full name, address, and telephone number of such person. We will not require a separate certification for each program.

2. Advance Notice

54. In the *Notice*, we asked for comment "on what would be a reasonable time frame for the required notification by a program provider to the cable operator . . ." We proposed in our rule a seven day advance notice requirement.

55. Commenters differ on what would be a reasonable period for advance notification. Acton suggests a one week period. MPAA, in reply comments, however, states that seven days' notice should be the "absolute maximum." Others suggest longer periods ranging from 14 days to 60 days. Time, on the other hand, believes notification should be made at the time of contracting for access. New York State argues, however, that a single, fixed notice period for each program might constitute an unconstitutional burden on the right of leased access programmers and, therefore, a more general, flexible approach might be suitable.

Discussion

56. We believe that a maximum of thirty days' advance notice prior to the access user's requested time for leased access should be adequate to enable cable operators to comply with the blocking requirement.[45] In our view, a thirty-day time period appropriately balances the interests and needs of leased access users and cable operators. We are aware of the desire of some cable operators to have a longer time period in order to prepare cable viewer guides. We believe, however, that a sixty-day time frame is too long. Our rule will not, we emphasize, prohibit leased access users from providing earlier notification, especially if they wish their programming to be published in monthly viewer guides that cable operators provide to their subscribers. Moreover, we are aware that a specific time slot requested may not be available and, therefore, alternative air dates or arrangements may have to be made. In such circumstances, no further notification from the program provider shall be required. We decline to adopt Time's suggestion that notification should be made at the time of contracting since that proposal may unreasonably hamper the flexibility of program providers committed to leased access use over extended periods of time. For the present, a thirty-day prior notice requirement seems reasonable. If we later find that this approach is too burdensome for either program providers or cable operators, we can alter it accordingly.

3. Record Retention Requirements

57. We sought comment in our *Notice* on whether "a cable operator should be required to retain notifications for a prescribed period of time."

58. Blade Communications argues that cable operators should not be required to retain notifications any longer than the applicable statute of limitations. Cox Cable, however, argues that notifications

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[45] A cable operator will, of course, be free to adopt a shorter advance notification time frame if it so chooses.

should not be kept any longer than three or four months while NCTA argues that there should be a short retention period as well as short period for filing complaints under section 612, as amended under the new Cable Act, which provides procedures for expediting disputes relating to leased access. Time argues for an eighteen-month period which it states is consistent with other record retention requirements, *e.g.*, section 76.225(c) relating to recordkeeping for commercial limits in children's programs. New York State points out that it requires the entity administering its other access channels to retain records for a two-year period.

Discussion

59. We shall require cable operators, consistent with our other cable recordkeeping requirements, to retain copies of program provider identifications and/or certifications for eighteen months from the date of receipt. This will ensure that such information will be available should any disputes arise under section 10(b) or related leased access provisions. As mentioned earlier, the notification or certification shall apply to the leased access user but need not specifically mention each program as long as the access user's notification or certification covers all of the programming intended to be carried on commercial leased access. Program providers will also be required to renew their certifications prior to the expiration of the eighteen month period for programming intended to be shown after that date.

E. Blocked Indecent Leased Access Programs

1. Blocking Mechanisms and Subscriber Access

60. As noted above, section 10(b) specifically requires cable operators to place all indecent programming on a single leased access channel and to block access to that channel unless the subscriber requests access in writing. In the *Notice*, we stated that "[o]ur proposed regulations would codify these statutory requirements" by requiring cable operators to place such programming "on a single leased access channel, employ appropriate blocking mechanisms, and permit access only if the

subscriber so requests in writing." We specifically asked commenters for relevant suggestions or comments "concerning appropriate blocking mechanisms and procedures relating to subscriber access."

61. Cable operators are almost unanimous in holding that the Commission should not prescribe a required method of blocking but should allow maximum flexibility as long as it is effective. Such methods should include scrambling, interdiction (by positive or negative traps), or lockboxes. In addition, Cox Cable states that the cable operator should not have to provide more than one blocked channel. In the same vein, Acton maintains that cable operators should be able to deny carriage if the blocked channel is full, while Time states that the cable operator should be allowed to provide more than one blocked channel if it chooses.

62. MPAA argues, in reply comments, that the Commission should take an expansive view of the "single" channel requirement by not limiting it to a 6 MHz channel standard but should interpret the statute to allow cable operators to provide such programming on multiple compressed channels. Acton also argues that the blocked channel obligation should only arise if an operator chooses to carry indecent leased access programming. TCI maintains that the cable operator should not be required to set aside a channel in advance. Acton also maintains that programmers offering indecent programming should not have a right to insist on the blocked channel option.

63. Acton further states that cable operators should not be required to block the channel on a twenty-four hour per day basis. Many other cable operators similarly state that they should not be required to block more channel capacity than necessary, i.e., the rest of the blocked channel should not be "warehoused" for indecent programming. For example, Continental Cablevision says that many cable systems cannot afford to devote two channels for leased access programming that would otherwise fit on a single leased access channel. It further states that cable operators should be allowed to aggregate and scramble all indecent leased access programming on a single channel. Time argues that, in addition to being allowed to block only during indecent programming, cable

operators should be able to limit periods for indecent programming and to choose time slots, and that programmers should not be permitted to change their minds during the contract period requiring channel placement changes. Cox Cable argues that cable operators should not be required, as part of the blocking obligations, to market blocked programming.

64. As for subscriber access, TCI says that the FCC should allow the cable operator to use any reasonable method to notify subscribers about the blocked channel. NCTA believes that subscribers should have sufficient time to request access to that channel in writing and that cable operators should have additional time to unblock that channel for interested subscribers. It therefore states that cable operators should have sixty days to notify subscribers (as well as to establish the channel) from an initial request for airing indecent leased access programming and, thereafter, a minimum of thirty days' notice to satisfy requests for blocking of service. Alliance maintains that subscribers should be able to request unblocking of a blocked channel by telephone after the subscriber has mailed the cable operator a written request and that the Commission should prescribe the form of the request and ensure that the cable operator protects the subscriber's privacy.

Discussion

65. We shall allow cable operators to employ any blocking mechanism that they choose — scrambling, interdiction or any other method, as long as it is effective.[46] We agree that cable operators

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[46] We have already addressed in paras. 12-17, *supra*, the mandatory "blocking" approach versus section 624's voluntary "lockbox", approach. Nevertheless, we think it would be permissible to place all indecent leased access programming on a single channel and use lockboxes as a blocking mechanism, so long as the blocking is accomplished in a non-voluntary manner such that access to the channel is precluded unless and until subscribers request access in writing. We believe this approach would satisfy the plain language of the statute (requiring subscribers to gain access by making requests in writing) and the statute's clear intent that cable operators, not subscribers, be responsible for initial blocking.

should not be required to block a leased access channel to be used for carriage of indecent leased access programming until they receive a request for carriage from a provider of indecent programming.[47] Similarly, cable operators should be allowed to use the channel for other non-blocked leased access programming to the extent it is not being used for indecent programming.[48] Thus, we will require that the channel be blocked only during those time periods that indecent leased access programming is being shown.

66. We disagree with those commenters who suggest that cable operators should be permitted, on blocked channels, the additional flexibility to "channel" such programming by scheduling it only at late hours of the evening or other times when children are least likely to be viewing. As we stated in the *Notice*, "[i]nstead of this type of 'safe harbor' approach" that has been applied to broadcasting, Congress appears to have "deliberately chosen" a 'blocking' approach, similar to that under section 223 for indecent telephonic communications.[49] We do agree with Time that cable operators should be permitted, if they so choose, to provide an additional blocked leased access channel for indecent programming if the first channel becomes full.[50]

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[47] As discussed below, however, operators must have the capability to block such a channel within the implementation time frame specified in our rules.

[48] As suggested by one commenter, the "blocked" channel shall be counted as part of the cable operator's obligation to provide leased access capacity under section 612, as amended by the new Cable Act.

[49] However, as previously indicated, *supra* note 39, we believe that cable operators with written and published policies issued pursuant to section 10(a) have authority under that section to block indecent programming and to schedule it as they please on blocked channels.

[50] We decline to address at this time whether operators that do not have a written and published policy under section 10(a) might be required to provide an additional blocked channel in the event a single channel is

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67. We decline to specify the form of notification about the availability of a blocked channel that cable operators should give to subscribers but we shall require that the subscriber's written request to receive the channel contain a statement that the subscriber is at least eighteen years of age. Cable operators will be required to "unblock" the channel within thirty days after receipt of a written subscriber request. Because it appears contrary to statutory intent, we decline to adopt Alliance's suggestion that "unblocking" should be permitted by telephone call if the subscriber has notified the cable operator in writing to activate his or her ability to have the block lifted. We believe that mere telephonic confirmation is insufficient to ascertain that the recipient is, in fact, at least eighteen years of age.

2. Time Period for Implementation

68. We did not specify or recommend in the *Notice* a specific time frame by which cable operators would be required to implement the blocking and associated requirements of section 10(b). Most cable operators argue that a time frame of 180 days following adoption of final FCC rules should be set to allow cable operators sufficient lead time to equip themselves and their customers in order to comply with the new requirements. Additionally, Time advocates that non-addressable cable systems be allowed ten years if they use lockboxes. Cox Cable urges cable operator compliance within 180 days following receipt of a first notification of request for carriage of indecent leased access programming. TCI states that cable operators should be afforded a reasonable time to comply but does not specify a particular time frame. Alliance argues that cable operators will need at least 120 days before they can implement the Commission's final rule but that the Commission should clarify that, during the interim period, the provisions of section 10 are to be stayed. MPAA states that an

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filled. If and when that circumstance arises, we can examine that question in a concrete factual setting.

acceptable time frame for implementation would be 120-180 days from the date the final rules become effective.

Discussion

69. We are aware that implementation of the new blocking requirements may be difficult for some cable systems that are not as technologically advanced as addressable systems and that the new requirement may require considerable adjustments by some cable systems in terms of rearranging existing services to accommodate a single leased access channel of indecent programming. In addition, the new regulations will require cable operators to establish and administer new procedures for subscriber notification of the availability of this new channel and for the processing of requests of leased access users and of subscriber requests for this channel, etc. We are also aware of the efforts that may be involved for those systems that require trapping devices to circumscribe access to these services.

70. In view of the foregoing considerations, we will require that cable operators have in place blocking implementation mechanisms and procedures within 120 days of the date of publication of the new regulations in the *Federal Register* so that thereafter they will not carry programming identified as indecent on non-blocked channels and will be able to accommodate any request for carriage of indecent programming on a blocked leased access channel within 0 days after its receipt. The 120 day period should provide cable operators sufficient time within which to make technical arrangements, inform subscribers of the new leased access blocking requirement and afford subscribers adequate time to notify the cable operator in writing if they wish to receive any programming on the channel when, and if, it becomes available on the system.[51]

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[51] As we noted earlier, subscribers should notify the cable operator in writing at least 30 days prior to the date they wish to receive the service and the notification should include a statement that the subscriber is at least eighteen years of age.

71. This, or similar measures taken during the transition period,[52] should also enable cable operators to approximate the number of subscribers initially interested in receiving the channel, which should assist in technical implementation of the blocked channel. At the expiration of the 120 day period, cable operators subject to section 10(b) will be required to place indecent programming on a blocked channel. This means that, no later than 30 days prior to the expiration of the 120 day period, programmers must identify any programming that is indecent and which is intended to be carried on the 121st day of the time period.

72. We believe that these time frames are reasonable and are generally consonant with the time frame requested by most of the parties in their comments. We note that cable operators have been on notice of the statute's requirement since the date of enactment of the new Cable Act, October 5, 1992. We further note that many cable systems have existing technology in place in various degrees for use in providing other services that can be adapted toward fulfilling these requirements. Thus, even though the implementation period may not be as long as many cable operators would prefer, we believe it is sufficient.

VI. Resolution of Disputes under Sections 10(b)

73. There was a broad range of comment over the forum and the manner in which disputes relating to indecent programming on

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[52] Unless cable operators have a written and established policy of prohibiting indecent leased access programs adopted under section 10(a) of the new Cable Act, they will not be permitted to prohibit indecent programming on the leased access channels during the transition period to the blocking approach. We decline to stay the provisions of section 10(a), as requested by Alliance, because we are not empowered to stay statutory provisions and, moreover, both section 10(a) and section 10(d) are self-executing provisions that became effective 60 days after enactment of the new Cable Act on October 5, 1992. We also shall not stay the effectiveness of the new rules adopted under section 10(b) pending court review, as requested by Alliance.

leased access channels should be handled. Some comments specifically addressed procedures for the leased access channels while other comments, particularly from access groups, were directed solely at the public, educational, and leased access channels on cable systems.[53] Time suggested that such disputes should be resolved locally, preferably in court, while others, such as Cox Cable, contend that the Commission is the proper forum for resolution of disputes. NCTA and others suggest that the Commission should adopt expedited resolution procedures consonant with the new provision in amended section 612(c)(4)(iii) that requires establishment of "procedures for the expedited resolution of disputes concerning rates or carriage under this section." Intermedia argues that the Commission should exercise exclusive jurisdiction, particularly over prior restraint issues and disputes.

74. Denver Access maintains that disputes should be appealable to the Commission or another neutral adjudicator. NATOA maintains that disputes should be resolved by the courts because ultimately, they must decide the constitutional issues. Alliance maintains that without procedural safeguards applicable to prior restraints on speech, the statute and implementing regulations cannot withstand constitutional scrutiny.

Discussion

75. We do not envision disputes arising from the content of programs on the leased access channel except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent. In view of the fact that Congress explicitly required us to adopt regulations implementing section 10(b), we believe that, in such instances, we are obligated to specify procedures for resolution of disputes relating to section 10(b)'s implementation. Therefore, where such

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[53] As noted previously, that part of this rule making addressing restrictions on the public, educational, and leased access channel will be addressed at a later date in a separate *Report and Order*. Accordingly, those comments will be considered therein.

disputes arise (*e.g.*, there is an allegation that a program provider failed to comply with the new program identification rules), we will entertain special relief petitions under section 76.7 of our rules, 47 C.F.R. § 76.7, from cable operators in accordance with the existing procedures we have established.[54] Similarly, we will entertain complaints from subscribers in accordance with our existing complaint procedures. If the petition or complaint is meritorious, we will then take appropriate action, based upon the circumstances, *e.g.*, issue a warning or a notice of apparent liability for violation of the statute and/or Commission rules, or denial of leased access to a program provider in the future.[55]

VII. Final Regulatory Analysis Statement

76. *The Need and Purpose of this Action.* The regulations in this *First Report and Order* are intended to implement that part of Section 10 of the Cable Consumer Protection and Competition Act of 1992 that directs the Commission to adopt regulations designed to limit children's access to indecent programming on commercial leased access channels. The regulations accomplish this by requiring cable operators (which do not voluntarily prohibit indecent programming) to place indecent programming, as identified by program providers, on a "blocked" leased access channel and

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[54] Congress, in section 9 of the new Cable Act, requires us to "establish procedures for the expedited resolution of disputes concerning rates or carriage under this section." We believe that Congress intended by this provision to insure that the rights of leased access users to carriage or reasonable rates under section 612 of the Communications Act would not be unduly prejudiced pending resolution of a dispute under section 10(b) of the new Cable Act, we will apply these expedited procedures.

[55] To the extent other disputes arise between the cable operator and program provider, they can also be handled, as appropriate, under the special relief provisions of section 76.7 of our rules. 47 C.F.R. § 76.7, particularly where they involve other provisions of amended section 612 of the Act relating to rates, terms and conditions of leased access use.

restricting subscriber access to this channel unless specifically requested in writing by a subscriber.

77. *Summary of Issues Raised By the Public Comments in Response to the Initial Regulatory Flexibility Analysis.* Boston Community Access commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on access administrators, access users, and others, their comments were not specifically directed to the Initial Regulatory Flexibility Analysis.

78. *Significant Alternatives Considered and Rejected.* In this First Report and Order, we have considered the most efficacious manner to implement the section 10's provisions relating to indecent programming on leased access channels and in the least burdensome manner that is consistent with the statute's aims. To the extent that Boston Community Access' comments, noted above, are directed to adoption of restrictions relating to the public, educational, and governmental access channels, they will be addressed in a subsequent *Report and Order*. To the extent they are intended to address leased access channel restrictions, we have attempted to minimize the burdens on leased access program providers by not requiring notification as to each individual program provided by them and by requiring such notifications only by those responsible for the content of the programming. No other significant alternatives consistent with the aims of the statute were presented.

VIII. Conclusion

79. Our purpose has been to implement the provisions of section 10(b) which, in accordance with the will of Congress, are intended to safeguard the well-being of children in our society, a compelling governmental interest, by reducing their exposure to indecent programming on commercial leased access channels. By the same token, we have sought to protect the constitutionally protected rights of others to distribute, and receive access to, such

programming on cable television. We believe that the regulations we have adopted strike an appropriate balance between these aims.

IX. Ordering Clauses

80. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub.L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as set forth in Appendix A below, effective 120 days from the date of publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

APPENDIX A

AMENDATORY TEXT

PART 76 – CABLE TELEVISION SERVICE [AMENDED]

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Sec. 612, as amended, §§ 106 Stat. §§ 1460, 47 U.S.C. §§ 532

2. Part 76 is amended by adding the following subpart:

Subpart L — Cable Television Access

§ 76.701 Leased Access Channels

(a) Notwithstanding 47 U.S.C. § 532(b)(2) (Communications Act of 1934, as amended, Section 612), a cable operator, in accordance with 47 U.S.C. § 532(h) (Cable Consumer Protection and Competition Act of 1992, § 10(a)), may adopt and enforce prospectively a written and published policy of prohibiting programming which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.

(b) A cable operator that does not prohibit the distribution of programming in accordance with paragraph (a) shall place any leased access programming identified by program providers as indecent on one or more channels that are available to subscribers only with their prior written consent as provided in paragraph (c).

(c) A cable operator shall make such programming available to a subscriber within 30 days of receipt of a written request for access to the programming that includes a statement that the requesting subscriber is at least eighteen years old; a cable operator shall terminate a subscriber's access to such programming within 30 days from receipt of a subscriber's request.

(d) A program provider requesting access on a leased access channel shall identify for a cable operator any programming that is indecent as defined in paragraph (g). Such identification shall be in writing and include the full name, address, and telephone number of the program provider and a statement that the program provider is responsible for the content of the programming. A cable operator may require that such identification be provided up to 30 days prior to the requested date for carriage. A program provider requesting carriage of "live programming" on a leased access channel that is not identified as indecent must exercise reasonable efforts to insure that indecent programming will not be presented. A cable operator will not be in violation of paragraph (b) if it fails

to block indecent programming that is not identified by a program provider as required in paragraph (d).

(e) A cable operator may request a program provider to certify that the programming intended for leased access is not obscene programming or indecent programming subject to the requirement of paragraph (b). A cable operator may request a program provider of "live programming" to certify that reasonable efforts will be made to ensure that such programming is not obscene programming or indecent programming subject to the requirement of paragraph (b).

(f) A cable operator shall not be required to provide leased access to a program provider if —

(1) the program provider refuses to identify whether programming is indecent as required under paragraph (d); or

(2) the program provider refuses or fails to certify, if requested by the cable operator under paragraph (e), that the programming is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(3) the program provider refuses or fails to certify, if requested by the cable operator under paragraph (e), that reasonable efforts will be made to ensure that any "live programming" is not obscene programming or indecent programming subject to the requirement of paragraph (b); or

(4) the program provider has failed to provide up to thirty days prior notice, if requested by the cable operator, that the programming is indecent.

(g) For purposes of paragraphs (b)-(f), "indecent programming" is any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium.

(h) Cable operators shall retain records sufficient to verify their compliance with paragraph (b) of this section and make such records available to the public. Such records must be retained for a period sufficient to cover the limitations period specified in 47 U.S.C. § 503(b)(6)(B).

3. Section 76.305(a) is amended by deleting the word "and" before "§ 76.225(c)" and deleting the period at the end of that paragraph and inserting "and § 76.701(h) (records for leased access)."

APPENDIX B

COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications")

Bogue, Virginia B. and Amy Lorum*

Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*

Multnomah Community Television National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors and the National Association of Counties ("NATOA")

National Cable Television Association, Inc. ("NCTA")

Nationwide Communications Inc. ("Nationwide Communications")

Neuman-Scott, Mark*

Nutmeg Public Access Television, Inc.

Rhoda, Carolyn*

Seffren, David A.*

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Visser, Randy, Director SPTV

Waycross Community Television

REPLY COMMENTS

Acton Corp., Allen's Television Cable Service, Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Greater Media, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision,

Inc., West Virginia Cable Television Association, Western Communications, Inc. ("Acton")

Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way ("Alliance")

Austin Community Television, Inc.

Baus, Janet

Cambridge Community Television

Channon, David

Cincinnati Community Video, Inc.

City of Austin, Texas

City of St. Paul

Columbus Community Cable Access, Inc.

Community Antenna Television Association, Inc.

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Friendly, Joe

Malden Access Television*

Mollberg, Erik S.

Motion Picture Association of America, Inc. ("MPAA")

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties ("NATOA")

National Cable Television Association ("NCTA")

New York Citizens Committee For Responsible Media*

Northrup, Dan

Nunez, Fred

Olelo: The Corporation & 70*

Staten Island Community Television

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Tucson Community Cable Corporation

Tsuno, Keiko

Viacom International Inc. ("Viacom")

Vitiello, Marisa

Waycross Community Television

Wyrod, Robert

*Informal comment or informal reply comment

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-258

In the Matter of

Implementation of Section 10 of the
Cable Consumer Protection and
Competition Act of 1992

Indecent Programming and Other Types
of Materials on Cable Access Channels

SECOND REPORT AND ORDER

Adopted: March 25, 1993; **Released: April 2, 1993**

By the Commission: Commissioner Marshall not participating.

I. INTRODUCTION

1. On October 5, 1992, Congress enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub.L. No. 102-385, 106 Stat. § 1460. Section 10(c) of the new Act expressly provides:

> Within 180 days following the date of the enactment of this Act, the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

2. On November 5, 1992, we adopted a *Notice of Proposed Rule Making*, 7 FCC Rcd 7709 (1992), seeking comment on proposals to implement section 10, including subsection (c) noted above. On February 1, 1993, we adopted a *First Report and Order ("First Report")*, 8 FCC Rcd 998 (1993), to implement section 10(b) of the new Act, which requires cable operators to block indecent programming on commercial leased access channels of cable systems unless subscribers specifically request access to such programming in writing. In the *First Report*, we stated that rules to implement section 10(c) of the Act, would be adopted at a subsequent date. This *Second Report and Order*, adopted today, constitutes our implementation of section 10(c) of the Act, as required under the 1992 Cable Act.

3. We received comments in this proceeding from cable operators, cable access organizations, governmental authorities, and others who might be directly or indirectly affected by cable operator-imposed restrictions on public, educational, and governmental ("PEG") access channels.[1] In the paragraphs that follow, we discuss the major issues raised by the commenters as they relate to section 10(c) and its implementation and the conclusions we reach on these matters.[2]

II. RELEVANT STATUTORY PROVISIONS

4. To provide an overall understanding of the issues involved in this proceeding, we shall first outline the relevant statutory

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[1] A list of the commenters in this proceeding is provided in Appendix B.

[2] Just as we stated in the *First Report* regarding commercial leased access, the question of which persons or entities should be required to bear the costs and expenses that arise when cable operators choose to prohibit materials under section 10 is more appropriately addressed in the cable rate regulation proceeding. *See Notice of Proposed Rulemaking in MM Docket No. 92-266*, FCC 92-544 (adopted December 10, 1992; released December 24, 1992).

provisions in the existing Communications Act of 1934, as amended, and the new Cable Act. First, section 611 of the Act, 47 U.S.C. § 531, provides that franchising authorities "may establish requirements . . . with respect to the designation of channel capacity for public, educational, or governmental use . . ." 47 U.S.C. § 531(a). Thus, unlike the commercial leased access channel requirements of section 612 of the Communications Act, 47 U.S.C. § 532, cable operators are not required by the Communications Act to provide public, educational or governmental access channels. Rather, the Act allows, but does not require, franchising authorities to impose PEG obligations. In addition, sections 611(b) and 611(c), 47 U.S.C. § 531(b) and (c), state that a franchising authority "may require rules and procedures for the use of the channel capacity designated pursuant to this section" and "may enforce any requirement in any franchise regarding the providing or use" of such channel capacity.

5. Section 611(e), 47 U.S.C. § 531(e), expressly prohibits cable operators from exercising "any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section." That provision is subject to section 624(d), 47 U.S.C. § 544(d), which allows a franchising authority and a cable operator to specify, in a franchise or renewal thereof, that certain services shall not be provided or shall be provided subject to conditions, if such services are "obscene or otherwise unprotected by the Constitution of the United States." Section 611(i) is now further subject to section 10(c) of the 1992 Cable Act, which, as noted above, permits cable operators to exercise editorial control over PEG channels for the limited purposes of prohibiting "programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, as noted in the *First Report and Order*, section 10(d) of the new Cable Act amended section 638 of the Communications Act, 47 U.S.C. § 548, by removing cable operators' immunity for programs that involve obscene materials on

any of the access channels (leased and PEG alike).[3] Having outlined the relevant statutory provisions, we shall now turn to the issues at hand.

III. CONSTITUTIONALITY OF SECTION 10(C)

6. As noted in the *First Report*, many commenters, including cable operators, access organizations and access users, challenged the constitutionality of section 10 of the new Cable Act, although, in some instances, for completely different reasons. Many of the arguments addressed therein were not limited to sections 10(a) and 10(b) of the new Cable Act relating to commercial leased access but were also directed to section 10(c) as it applies to the PEG channels. On the other hand, some cable interests, for example NCTA, maintain that to the extent section 10 affords cable operators the discretion to prohibit such materials on the PEG channels, it simply restores some of their first amendment rights on such channels.[4]

Discussion

7. In the *First Report*, we rejected a constitutional challenge that section 10(a), which permits cable operators to prohibit indecent programming through a written and published policy, constitutes "state action" and is therefore unconstitutional because it allows cable operators to serve as "surrogates" for the government and prohibit indecent programming completely on commercial leased access. Instead, we held that a voluntary policy prohibiting such programming does not constitute state action and, therefore, because section 10(a) does not mandate such cable

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[3] This particular provision is self-effectuating and therefore became effective December 4, 1992.

[4] As we stated in the *First Report*, our actions in this proceeding are limited to section 10's provisions and their implementation and, for this reason, we shall not address the constitutionality of other parts of the new Cable Act or existing Communications Act that are not directly at issue here or properly within the scope of our *Notice of Proposed Rule Making*.

operator policies, the section does not violate the prohibition on government regulation of speech under the first amendment.[5]

8. With respect to the similar claim that a cable operator's discretion exercised pursuant to section 10(c) is "state action," cable operators are not compelled under that provision to serve as "government surrogates" in prohibiting programming. Cable operators are merely given the freedom to prohibit certain types of program materials if they so choose, just as they are permitted to prohibit indecent programming under section 10(a). Nothing in the language or legislative history of this subsection suggests that Congress meant the additional latitude accorded to cable operators was intended to be mandatory.[6] Thus, we do not believe that

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[5] Similarly, we declined to hold that access channels are public forums and thus subject to the state action doctrine. We stated that none of the cases cited by Alliance had held that cable access channels were public forums. We pointed out that, by analogy, commercial leased access is similar in purpose and function to common carriage and that courts had refused to find that the activities of common carriers constitute state action for constitutional purposes. We believe that this same reasoning extends to public access channels on cable systems. Moreover, to the extent that educational and governmental access channels are to be used only by specified local entities, not the public at large, these channels would appear even less akin to public forum facilities.

[6] For this reason, this provision cannot be said to be "underinclusive," as alleged by Alliance and New York Committee for a Responsible Media because it singles out particular materials on the PEG channels but not on the non-access channels. Cable operators now have the same freedom to prohibit these materials on the PEG channels that they have on the non-access channels. In any event, Congress is free to determine that, in view of the unique attributes of these types of channels and the problems that they pose, cable operators should have this editorial discretion. As Alliance itself points out, "[e]ach method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses, and dangers' of each method." *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 501 (1981), quoting *Kovacs v. Cooper*, 335 U.S. 77, 97 (1949).

Congress' decision to allow cable operators editorial discretion as provided by the statute constitutes state action.

9. In addition, state action does not exist merely because cable operators are no longer immune from liability for obscene programming on access channels. In this regard, commenters argue that the "voluntary" aspect of the provision is removed, and hence is illusory, when coupled with section 10(d)'s removal of cable operator's immunity for obscene programming on access channels. However, by analogy, the fact that a common carrier may not be immune from liability for transmission of obscene materials if it has actual knowledge of the use of its facilities for this purpose in no way renders the activities of a common carrier state action when it prohibits the unlawful transmission of obscene material. Just as federal or state law can require that common carrier facilities be used only for lawful purposes, so too can such laws require that cable access facilities be used only for lawful purposes. Thus, as we explained in the *First Report*, para. 22 n. 22, as with common carriers, a cable operator's decision to ban obscene programming does not constitute state action or even an unlawful restraint merely because the cable operator is subject to potential liability for carriage of obscene programming.

IV. IMPLEMENTATION OF SECTION 10(C)

A. Definition of Statutory Terms

10. The prohibitions which cable operators may impose under Section 10(c) cover "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."[7] Neither the statute nor the

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[7] In this regard, we note that, to the extent section 10(c) covers materials also covered by section 624(d), section 10(c) permits unilateral action by cable operators, whereas section 624(d) contemplates action pursuant to agreement between cable operators and franchise authorities. In light of that, we disagree with commenters, such as the City of St.

(continued...)

legislative history provide a definition of these terms. In the *Notice*, however, we stated that the Senate drafters apparently intended the term programming involving "sexually explicit" conduct to mean the same types of indecent programming material that may be prohibited by cable operators on leased access channels. *See* para. 13 n.11, citing 138 CONG. REC. § 646 (daily ed. Jan. 30, 1992). Similarly, we suggested that the provision relating to "material soliciting or promoting unlawful conduct" may have been intended by Senate drafters to address programming that solicits prostitution. *Id.*

11. Alliance maintains that the particular restrictions relating to sexually explicit conduct and promoting unlawful conduct are overbroad. It, as well as Acton, states that the term "sexually explicit conduct" omits reference to patently offensive or to community standards. Boston Community Access maintains that this term is overbroad and that the FCC's interpretation is flawed. It argues that the term should be given the same meaning as

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[7](...continued)

Paul, who contend that Congress did not intend section 10(c) to preempt any existing agreements entered into pursuant to section 624(d). The City of St. Paul argues that such prior agreements concerning the manner in which cable operators may exercise control over PEG channels should be viewed as "waiving" cable operator's section 10(c) rights. In view of section 10(c)'s permissive nature, such waivers, it is argued, do not conflict with, and therefore are not preempted by, section 10(c). As a general matter, however, we believe that agreements entered into prior to the effective date of rules implementing section 10(c) would not be viewed as "waiving" future section 10(c) rights unless such a waiver is express. Accordingly, unless the cable operator agrees, or a court determines, that future rights under section 10(c) have been waived through a pre-existing franchise agreement, we believe that Congress intended the new rights accorded by section 10(c) to supersede prior agreements under section 624(d). Further, we do not believe such an interpretation is unfair to franchise authorities. A franchising authority's ability to impose PEG access requirement and to restrict a cable operator's control over such channels stems from provisions of the Cable Act, and Congress is free to create exceptions to those statutory provisions.

"obscene." On the other hand, Cox Cable, Intermedia, New York State and others argue that the term should be construed as "indecent" and that the Commission should use the term "indecent" in the rules to avoid confusion and to clarify its meaning. According to Bogue and Lerom, the term should include frontal nudity, nude dancing, sado-masochistic behavior, excretory activities, exposed genitals and fondling.[8]

12. Acton maintains that the term "soliciting or promoting unlawful conduct" is not susceptible to the meaning suggested by the Commission in the *Notice* since it is not limited to prostitution but includes a vast array of criminal activities such as drug use and illegal gambling. The City of San Antonio states that the rul should clarify and specifically allow these terms to be defined by cable operators and also clarify whether unlawful conduct such as copyright infringement, presenting slanderous materials or violation of other similar laws can themselves be prohibited by cable operators in its policies. New York State says that Commission efforts to clarify this category should recognize that PEG channels are limited to noncommercial use. Alliance maintains that, under *Hess v. Indiana*, 414 U.S. 105, 108 (1973) and other cases, the U.S. Constitution forbids or proscribes restrictions on speech relating to advocacy of law violations. Santa Barbara echoes this view in stating that this provision would permit cable operators to ban advocacy of civil disobedience or material that might challenge existing laws. Manhattan Neighborhood Network suggests that restriction of the types of materials described in the statute is disturbingly vague and, therefore, urges that the rules should be specific and as narrowly defined as possible.

Discussion

Obscenity

13. At the outset, we conclude that cable operators, in order to exercise the limited degree of discretion allowable under section

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[8] They also assert that interpretations of this term should be made by local cable advisory committees. *See* discussion in para. 31, *infra*, regarding resolution of disputes.

10(c), must be apprised of the specific categories of programming they may prohibit and of the meaning that should be ascribed to these categories. Although the legislative history provides some guidance, it does not remove all ambiguity as to the meaning of these terms. With respect to programming "containing obscene materials," we believe that the scope of the this provision should be coextensive with materials that meet the test set forth in *Miller v. California*, 413 U.S. 15 (1973).[9] Thus, cable operators should be guided by the *Miller* obscenity standard in their determinations of what materials fit into the first category.

Sexually Explicit Conduct

14. The second category refers to programming containing "sexually explicit conduct." As noted above, neither the statute nor legislative history provides a definition of this phrase. Although we are urged by some commenters to construe these words to mean "obscene," we believe, as explained below, that a more reasonable construction of the statute would be to interpret these words as meaning "indecent." It is clear from the very words of the statute itself, and from the legislative history, that Congress did not intend the three categories of materials to be construed as either synonymous or interchangeable with each other. Congress clearly meant the third category, promoting or soliciting unlawful conduct, to be something different from the first category, obscene materials. Moreover, there is nothing to suggest that Congress intended the first and second categories to be construed the same; otherwise, Congress' inclusion of "sexually explicit conduct" would be mere surplusage and, hence, unnecessary. Thus, it is our belief that

[9] Although similar to the indecency standard, the test under *Miller* also requires findings (1) that the work appeals to the prurient interest and (2) that the work, if taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24.

Congress intended each of these categories to be separate and distinct as to their meaning and application.[10]

15. Having concluded that Congress meant to ascribe different meanings to each of the terms used, we must discern from congressional intent the meaning that should be ascribed to the second category in section 10(c). As some of the parties point out, some programming may contain "sexually explicit conduct" that is not necessarily "indecent" as we define that term under section 10(b) and as described under section 10(a). Nevertheless, we believe that a construction of "sexually explicit conduct" to mean indecent programming is reasonable, given the purposes underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to "indecent" programming on cable access channels. This fact suggests to us that Congress did not intend to accord this term a meaning different from that of "indecent." In addition, by this interpretation, we think that cable operators and others will be able to discern the meaning of the term more clearly and precisely. In this regard, the courts have previously upheld the Commission's generic definition of "indecent" as sufficiently defined to provide guidance to a person of ordinary intelligence. *See Dial Information Services v. Thornburg*, 938 F.2d 1535, 1540-41 (2d Cir.1991). Accordingly, we believe that the same standard applicable under section 10(a) and, as defined by us for purposes of section 10(b), should also govern cable operators' determinations under section 10(c).

Soliciting or Promoting Unlawful Conduct

16. As to the scope of the term "soliciting or promoting unlawful conduct," we believe that the intent underlying the statute is to make clear that if the dissemination of information or material would constitute unlawful solicitation of a crime or would otherwise be illegal under federal, state, or local law, it would also be subject to proscription by cable operators on the PEG access channels.

[10] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 739-740 (1978) (words "obscene, indecent, or profane" in 18 U.S.C. § 1464, written in disjunctive, meant to have separate meanings).

17. For example, consistent with the legislative history noted above, it would cover solicitation of prostitution where such solicitation is unlawful and therefore a crime. Similarly, it would appear to cover the presentation of materials that are unlawful because they are likely to incite an immediate breach of peace or otherwise incite imminent unlawful action. *See, e.g., Wilson v. Attaway*, 757 F.2d 1227 (11th Cir.1985), *rehearing denied*, 764 F.2d 1411. It would also appear to include the making of a threat of bodily harm against a government informant since such threats are subject to punishment under federal law, 18 U.S.C.A. § 1513, and have been held not to involve "threats" relating to ideas or advocacy. *See U.S. v. Velasquez*. 772 F.2d 1348 (7th Cir.1985), *cert. denied*, 475 U.S. 1021 (1986). Similarly, the dissemination by any member of the military of secret military intelligence would appear to fit into this category because such dissemination is prohibited to "one not entitled to it" under 18 U.S.C.A. § 793. *See United States v. Morison*, 844 F.2d 1057 (4th Cir.1988), *cert. denied*, 109 S.Ct. 259 (1988). In these and analogous circumstances, the cable operator would be free to prohibit these materials on the basis that the disseminations are unlawful. Conversely, this part of the statute would not cover speech that is otherwise protected, *e.g.*, speech advocating civil disobedience that is not directed at inciting or producing imminent lawless action. We believe this interpretation is reasonable and consistent with the intent and purpose underlying this particular provision. For example, we note by analogy that communications common carriers are permitted to prohibit use of their facilities for unlawful purposes.[11]

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[11] *See Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 FCC Rcd 2819 (1987).

B. Cable Operator Discretion under Section 10(c)

18. Continental Cablevision states that section 10(c) should be interpreted to permit cable operators to prohibit some, but not necessarily all, of the types of programs specified in section 10(c). Acton states that since the PEG channel provision is voluntary, operators should have substantial flexibility, including the option to pursue a safe harbor approach for "mature" programming. If a cable operator has the statutory right to ban such programming, Acton asserts, it must have the lesser right to channel it. The City of San Antonio agrees insofar as it advocates rules that allow discretion to schedule programs so that more adult-oriented programming is reserved for later hours. Bogue and Lerom, however, state that the Commission should require that any indecent or sexually explicit programming may be shown only after midnight and before 6 a.m.

Discussion

19. We believe that section 10(c) was intended to afford cable operators broad discretion in deciding how to treat PEG programming covered by section 10(c). Thus, for example, we believe that a cable operator could decide under section 10(c) to prohibit only obscene programming from the PEG access channels but not other types of programming described in that subsection. Similarly, we believe that this discretion also allows cable operators to require indecent programming to be shown in the late evening hours, rather than prohibiting such programming entirely. A cable operator could also decide to prohibit such programming on the public access channel but not exercise such control over the other access channels designated by local authorities for educational or governmental use.

20. Further, we believe that a "reasonableness" standard should be read into section 10(c). This will permit cable operators to prohibit programming which they "reasonably believe" falls within the section 10(c) categories. Such an interpretation will ensure that cable operators act in good faith in making such determinations and will further ensure that, where local authorities have authorized PEG channels, materials falling outside the

proscribed categories are not unreasonably barred from presentation.

C. Certification as Method of Enforcement of Prohibitions

21. In the *Notice*, we requested comment on whether it would be appropriate for cable operators to implement their section 10(c) policies by requiring certifications from users that no materials fitting into any of the statutory categories would be presented on these channels.

22. Cable interests were very supportive of a certification approach under section 10(c). Blade Communications favors allowing cable operators to require certification as to whether programming on the PEG channels is obscene and limiting liability for those who comply with regulatory steps for obtaining programmer certification. Similarly, CATA suggests that cable operators should be allowed to require and rely upon certifications from programmers and that the burden to identify such programming should be on programmers. NCTA and other cable interests also believe that cable operators should be able to rely on certifications and should be immunized from liability when doing so. In addition, Nationwide urges that cable operators be allowed to obtain certifications from the party providing programming directly to the cable operator. TCI, also urging a certification approach, says that the Commission should state that cable operators are not liable for non-obscene programming on the access channels.

23. Franchising authorities also were generally receptive toward this approach. For example, the City of Austin states that a certification requirement would be an appropriate mechanism, although it urges the Commission to impose this requirement on the individuals responsible for programming content and to allow public access managers to administer it. Along similar lines, NATOA states that primary responsibility should be on programmers to identify obscene material and to certify that their programming does not contain obscene or indecent material. In addition, NATOA recommends, as others do, that programmers be permitted to certify

on a blanket, as opposed to a program-by-program, basis. The City of Austin, however, advocates that the Commission craft its rules to allow cable operators very little discretion under any program certification process.[12] The City of San Antonio recommends that the new rules place the burden of certification on the producer.

24. Access organizations and access users were either opposed to, or less than enthusiastic about, use of a certification process. For example, Boston Community Access believes that requiring certification for each program would impose a huge new burden of staff work and paperwork on organizations such as itself, especially since there are very few access programs that actually contain material prohibited by the proposed rule. Similarly, Randy Visser maintains that requiring certifications for users of local public access channels is unrealistic and could not be enforced through the local cable regulatory structure. Alliance maintains that there is simply no need for the Commission to require that programmers certify the content of their programs because, in its opinion, operator liability should not be implicated. Other access groups, for example Ann Arbor, state generally that the rules should be specific and narrow so as not to hamper use of access channels by those seeking to provide live or taped programming.

Discussion

25. In the *First Report*, we stated that cable operators would not be precluded from requiring certifications from providers of leased access programming, as appropriate, under either section 10(a) (relating to a cable operator-enforced prohibition on indecent programming) or section 10(b) (relating to the blocking of indecent

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[12] The City of Austin also alleges, as did Alliance, that the Commission's *Notice of Proposed Rule Making* failed to comply with the Administrative Procedure Act ("APA") and, therefore, urges the Commission to issue a revised *Notice*. We explained in the *First Report* the reasons for our belief that the Notice provided adequate notice of our proposals and opportunity to comment consistent with APA requirements. Our rationale and analysis equally pertains to this part of the rulemaking process and, therefore, the City of Austin's arguments are rejected.

leased access programming). We stated that a relatively simple, straightforward certification need not be burdensome nor serve as a deterrent to access users. We believe that the same analysis and conclusions apply to the PEG channels. Accordingly, we will not deny cable operators the right to require certifications that the programming intended for presentation on a PEG channel does not contain material that the cable operator has proscribed under section 10(c). Moreover, as we stated in the *First Report*, in view of the removal of cable operators' immunity for obscene programming on access channels, permitting a certification requirement is a reasonable approach for this agency to adopt.[13]

26. As suggested by several commenters, we thus believe that it would be permissible for cable operators to require blanket certifications from access users or from an access manager or administrator where the access manager or administrator agrees to assume the certification obligation.[14] This should minimize burdens both for access users and access administrators and managers. Indeed, from the comments received, it appears that a number of access organizations already have in place procedures that require certification statements, or their equivalent, from access programmers.[15] In addition, as suggested by a number of commenters, we believe that cable operators should be permitted to require certifications that reasonable efforts will be used to ensure

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[13] Similarly, as permitted in the *First Report* relating to leased access, we will not deny cable operators the right to request indemnification from access users for the cost and expenses attributable to defending a prosecution for carriage of an alleged obscene program that is certified as "not obscene" by an access programmer.

[14] Access administrators, even if they decide not to certify themselves, could be required by cable operators to undertake the ministerial task of obtaining certifications from users.

[15] *See, e.g.*, Statement of Hudson Community Access Television.

that no live programming contains material prohibited by a cable operator under section 10(c).[16]

V. RESOLUTION OF DISPUTES

27. In the *Notice*, we asked commenters "to address whether specific procedures should be developed to govern disputes between the cable operator and programmer of these access channels." Because "these channels are mandated and their conditions of use are defined at the local level," we proposed that "any such disputes should be handled at the local level."

28. Cable operators differ on the question of the appropriate forum for resolution of section 10(c) disputes. For example, Acton argues that individual disputes should be resolved locally, preferably in court, although it would not be opposed to local franchising authorities that assume original jurisdiction over such matters. On the other hand, Intermedia would prefer that disputes over PEG channels and section 10(c) be adjudicated by the Commission.

29. Access organizations and interests argue that procedural safeguards should apply to disputes that arise over the content of material airing on the PEG access channels to ensure that cable operators do not impermissibly prohibit or otherwise restrain the showing of access programming on these channels.[17] Baratta, however, states that all questions of content should be dealt with on the local level.

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[16] In the *First Report*, para. 51 n. 43, we addressed and rejected arguments that certification requirements impermissibly violate program providers' rights under the first amendment or otherwise. In view of that discussion, we need not address these arguments again.

[17] Some commenters argue that procedural safeguards are required under the Constitution and must be provided if cable operators are allowed to prohibit or otherwise restrain certain types of programming on PEG channels under section 10(c). We have already rejected arguments that according cable operators additional control over their cable systems constitutes impermissible state action. As stated previously, the first amendment and the procedural safeguards pertaining thereto, apply to government, not private, action.

30. Governmental authorities are virtually unanimous in the view that such matters should be handled at the nonfederal level. For example, New York State maintains that since resolution of such disputes is a nonfederal matter, such matters, i.e., disputes between cable operators and programmers of the PEG channels, should be handled at the local level. Similarly, the City of San Antonio urges that the rules should provide for dispute resolution at the local level. However, the City of Austin argues that where the franchising authority is also the programmer, disputes should be resolved by the Commission but, otherwise, disputes should be handled by the franchising authority. NATOA, on the other hand, favors resolution of disputes in the judicial system, rather than by franchising authorities, at the local level, especially where the franchising authority may be the programmer, editor, or facilitator. The City of Tampa advocates initial review of disputes by the cable operator, followed by referral of unresolved disputes to a citizen advisory committee with appropriate authority, review by the franchising authority and, finally, judicial process.

Discussion

31. We believe that, to the extent possible, disputes under section 10(c) should be resolved in accordance with the rules and procedures established by the franchising authority for the operation of these channels. As pointed out earlier, section 611 expressly allows franchising authorities to specify rules and procedures for the PEG access channels and to enforce them. To the extent that a franchise agreement does not provide for resolution of PEG channel disputes, we assume that recourse could be obtained through the local judicial process given the local nature and character of these channels. Indeed, this might be especially appropriate where the dispute is between the franchising authority itself as a programmer or user of the PEG access channel and the cable operator. We see no need for federal intervention in such matters at this time.

VI. CLARIFICATION OF ASPECTS OF FIRST REPORT

32. In the *First Report*, we stated that copies of program provider identifications and/or certifications should be retained for

eighteen months. We wish to clarify that, as the rule appendix to the *First Report* states, the records sufficient to verify cable operator compliance with the blocking requirement should be retained "for a period sufficient to cover the limitations period specified in 47 U.S.C. § 503(b)(6)(B)," i.e., twelve months. Thus, the correct record retention period is twelve months as new rule section 76.701(h) provides. We also wish to clarify that while cable operators are required to retain requests to receive or terminate access to the blocked leased access channel for the twelve month period, they shall not make such information available to the public nor maintain such information in their public inspection files. Section 631 of the Communications Act, 47 U.S.C. § 551, expressly prohibits cable operators from disclosing "personally identifiable information" about subscribers without their consent. Accordingly, such information should not be included in cable operators' public inspection files.

VII. FINAL REGULATORY ANALYSIS STATEMENT

33. The Need and Purpose of this Action. The regulations in this *Second Report and Order* are intended to implement that part of the Cable Consumer and Competition Act that directs the Commission to adopt regulations to enable cable operators to prohibit any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct on public, educational, or governmental access channels. The regulations accomplish this by allowing cable operators to prohibit such materials.

34. Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis. Boston Community commented on the failure of the initial analysis to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers, not merely the new burdens that would be placed on cable operators. Although others pointed out the burdens that would be imposed on these entities and persons, their comments

were not specifically directed to the Initial Regulatory Flexibility Analysis.

35. *Significant Alternatives Considered and Rejected*. In this *Second Report*, we have considered the most efficacious manner of implementing section 10(c) without imposing unreasonable burdens on the various entities involved. Although a number of commenters alleged that a certification approach as suggested in the *Notice of Proposed Rule Making* would significantly increase burdens on administrators, managers, and users of the public, educational, and governmental access channels and, therefore, would not be appropriate, we have concluded that Congress gave cable operators broad discretion under section 10(c). Consistent with this approach, cable operators are permitted to require blanket, rather than program-by-program, certifications in an effort to ease burdens that might otherwise occur. Finally, the fact that a number of access organizations that administer or manage public access channels already have procedures similar to a certification process in place should further minimize the burdens under this approach.

VIII. CONCLUSION

36. Congress has directed us to adopt rules to enable cable operators to prohibit certain types of materials on the public, educational, and governmental access channels of cable systems. We believe that our action herein accomplishes this goal by balancing the respective interests of cable operators, access users and viewers in a manner designed to lessen the burdens for all interests alike.

IX. ORDERING CLAUSES

37. Accordingly, pursuant to section 10 of the Cable Consumer Protection and Competition Act of 1992, Pub.L. 102-385, and sections 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, Part 76 of the Commission's Rules IS AMENDED, as

set forth in Appendix A below, effective 30 days from the date of publication in the *Federal Register*.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Secretary

APPENDIX A

FINAL RULE

PART 76 — CABLE TELEVISION SERVICE

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611-612, as amended, 106 Stat. § 1460, 47 U.S.C. § 531-532

2. Part 76 is amended by adding at the end of Subpart L — "Cable Television Access" new section 76.702 which reads as follows:

§ 76.702 Public, Educational and Governmental Access. Any cable operator may prohibit the use on its system of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, indecent material as defined in section 76.701(g), or material

soliciting or promoting unlawful conduct. For purposes of this section, "material soliciting or promoting unlawful conduct" shall mean material that is otherwise proscribed by law. A cable operator may require any access user, or access manager or administrator agreeing to assume the responsibility of certifying, to certify that its programming does not contain any of the materials described above and that reasonable efforts will be used to ensure that live programming does not contain such material.

APPENDIX B

COMMENTS

Acton Corp., Allen's Television Cable Service, Inc., Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM, Inc., Monmouth Cablevision Assoc., TeleCable Corporation, Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association ("Acton")

Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way (jointly) ("Alliance")

Ann Arbor Community Access Television

Arizona Cable Television Association*

Baratta, Mark Conrad*

Biddeford Public Access Corp.*

Blade Communications, Inc.; Multivision Cable TV Corp.; Parcable, Inc.; Providence Journal Company; and Sammons Communications, Inc. (jointly) ("Blade Communications")

Bogue, Virginia B. and Amy Lorum* ("Bogue and Lorum")

Boston Community Access and Programming Foundation ("Boston Community Access")

Capital Community Television, Salem, Oregon

City of Austin, Texas*

City of Cleveland Heights*

City of San Antonio, Texas

City of Santa Barbara*

City of Tampa, Florida

Cole, Roxie, Lee

Columbus Community Cable Access, Inc.

Community Access Network, Incorporated

Community Antenna Television Association, Inc. ("CATA")

Continental Cablevision, Inc. ("Continental Cablevision")

Cox Cable Communications ("Cox Cable")

Crandall, Judy

Defiance Community Television

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Dreety, David B.

Ducarpe, Ron*

Fortriede, Steven C., Associate Director, Allen County Public Library, Fort Wayne, Indiana

Hillsborough County Board of County Commissioners

Hudson Community Access Television*

Inter-Comm Network

Intermedia Partners ("Intermedia")

Manhattan Neighborhood Network

Metropolitan Area Communications Commission*

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors and the National Association of Counties ("NATOA")

National Cable Television Association, Inc. ("NCTA")

Nationwide Communications Inc. ("Nationwide Communications")

New York State Commission on Cable Television ("New York State")

Neuman-Scott, Mark*

Nutmeg Public Access Television, Inc.

Rhoda, Carolyn*

Seffren, David A.*

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Visser, Randy, Director SPTV

Waycross Community Television

REPLY COMMENTS

Acton Corp., Allen's Television Cable Service, Cable Television Association of Maryland, Delaware and District of Columbia, Century Communications Corp., Columbia International, Inc., Florida Cable Television Association, Gilmer Cable Television Company, Inc., Greater Media, Inc., Helicon Corp., Jones Intercable, Inc., KBLCOM Inc., Monmouth Cablevision Assoc., TeleCable Corporation,

Texas Cable TV Association, United Video Cablevision, Inc., West Virginia Cable Television Association, Western Communications, Inc. ("Acton")

Alliance for Community Media, The Alliance for Communications Democracy, The American Civil Liberties Union and People for the American Way ("Alliance")

Austin Community Television, Inc.

Baus, Janet

Cambridge Community Television

Channon, David

Cincinnati Community Video, Inc.

City of Austin, Texas

City of St. Paul

Columbus Community Cable Access, Inc.

Community Antenna Television Association, Inc.

Denver Area Educational Telecommunications Consortium, Inc. ("Denver Access")

Friendly, Joe

Malden Access Television*

Mollberg, Erik S.

Motion Picture Association of America, Inc. ("MPAA")

Multnomah Community Television

National Association of Telecommunications Officers and Advisors, National League of Cities, United States Conference of Mayors, and the National Association of Counties ("NATOA")

National Cable Television Association ("NCTA")

New York Citizens Committee For Responsible Media*

Northrup, Dan

Nunez, Fred

Olelo: The Corporation

Rancho Palos Verdes City Council*

Staten Island Community Television

Tele-Communications, Inc. ("TCI")

Time Warner Entertainment Company, L.P. ("Time")

Tucson Community Cable Corporation

Tsuno, Keiko

Viacom International Inc. ("Viacom")

Vitiello, Marisa

Waycross Community Television

Wyrod, Robert

* Informal comment or informal reply comment

Supreme Court, U.S.
FILED
OCT 10 1995
OFFICE OF THE CLERK

Nos. 95-124 and 95-227

In the Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1486, authorizes operators of cable television systems to prohibit indecent programming on channels set aside for lease by unaffiliated third parties ("leased access channels") as well as channels reserved for public, educational or governmental ("PEG") use. In addition, with respect to the leased access channels, if the cable operator chooses not to prohibit indecent programming on those channels, the operator must place such programming on a separate channel and block access to that channel until the cable subscriber requests access in writing. The questions presented are:

1. Whether a cable operator's decision to prohibit indecent programming from its leased access or PEG channels is "state action" attributable to the federal government.

2. Whether Section 10 or its implementing regulations violate the First Amendment in requiring cable operators who choose not to ban indecent programming on their leased access channels to segregate and block such programming, permitting access only upon a subscriber's written request.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-124

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 95-227

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals *in banc* (Pet. App.[1] 2a-88a) is reported at 56 F.3d 105. The opinion of the panel (Pet. App. 90a-125a) is reported at 10 F.3d

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[1] References to "Pet. App." are to the Appendix to the Petition in No. 95-124.

812. The Federal Communications Commission's First Report and Order (Pet. App. 128a-177a) is reported at 8 FCC Rcd 998, and its Second Report and Order (Pet. App. 178a-202a) is reported at 8 FCC Rcd 2638.

JURISDICTION

The judgment of the court of appeals *in banc* was entered on June 6, 1995. Petitions for a writ of certiorari were filed on July 21, 1995, and August 9, 1995, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Federal law requires operators of cable television systems with more than 36 channels to set aside a certain number of channels for commercial lease by unaffiliated third parties, see 47 U.S.C. 532(b), and empowers local franchise authorities to have operators reserve certain channels for "public, educational, or governmental [PEG] use." 47 U.S.C. 531 (Supp. V 1993).

When Congress first enacted these provisions in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (the 1984 Act), it forbade cable operators from exercising editorial control over their PEG and leased access channels, see 47 U.S.C. 531(e), 532(c)(2) (1988), and provided that operators "shall not incur any * * * liability" under federal, state, and local obscenity laws for programs carried on such channels. 47 U.S.C. 558 (1988).

Congress revisited the question of indecent and obscene cable access programming as part of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460

(the 1992 Act). "The problem," Congress was informed, "is that cable companies are required to carry, on leased access channels, any and every program that comes along," including programs that include a wide variety of highly indecent material. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).[2] Members of Congress were aware that "early and sustained exposure" to such material can cause "significant physical, psychological, and social damage to a child." *Id.* at S649 (statement of Sen. Coats).

To protect against the harm to children and to return a measure of editorial control to cable operators, Congress decided to allow operators to prohibit indecent programming on leased access channels. Thus, Section 10(a) of the 1992 Act permits cable operators to enforce "a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. 532(h) (Supp. V 1993).

Congress also found that the problem of indecent programming existed on PEG as well as leased access

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[2] See 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (describing leased access program in New York that "depicts men and women stripping completely nude," another featuring people performing oral sex, and a channel with advertisements promoting "incest, bestiality, [and] even rape."). See also *id.* at S648 (statement of Sen. Thurmond) (noting leased access channel with "numerous sex shows and X-rated previews of hard-core homosexual films" as well as channels with advertisements for phone lines letting listeners eavesdrop on acts of incest).

channels.[3] Congress accordingly adopted Section 10(c) of the 1992 Act, which requires the Commission to enable cable operators to prohibit the use of PEG channels "for any programming which contains obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct." See note following 47 U.S.C. 531 (Supp. V 1993). In this way, Congress intended to permit cable operators "to police their own systems, which they cannot do now." 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth).

Congress also required the Federal Communications Commission to promulgate regulations to limit the access of children to the indecent programming that continued to be carried on leased access channels. Section 10(b) of the 1992 Act requires operators who permit the carriage of indecent programming on leased access channels to place the programming on a separate channel and to block a subscriber's access to that channel until the subscriber requests in writing that the channel be unblocked. See 47 U.S.C. 532(j) (Supp. V 1993). As Congress was informed, the segregation and blocking requirement was "precisely the same method" that Congress used to block access to indecent telephone messages (so-called "dial-a-porn"). 138 Cong. Rec.

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[3] See 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Fowler) (observing that such channels were being used "to basically solicit prostitution though easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone, are soliciting illegal activities"); see also *id.* at S650 (statement of Sen. Wirth) (agreeing that public access "has * * * been abused").

S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). Congress enacted no similar segregation and blocking requirement for PEG channels, however.

Section 10(d) of the 1992 Act eliminates the immunity of cable operators for obscene access programming, by making clear that operators would be free from liability for programming on leased access and PEG channels "unless the program involves obscene material." 47 U.S.C. 558 (Supp. V 1993). As the provision's sponsor explained, "it was never the intent of the Congress * * * to provide a safe harbor for obscenity." 38 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

2. The Commission adopted final regulations implementing the provisions of the statute governing leased access channels in its *First Report and Order*, 8 FCC Rcd 998 (1993) (Pet. App. 128a). The Commission made clear that, consistent with the definition contained in Section 10(a) of the statute (itself based on the Commission's longstanding formulation), indecent programming subject to blocking consists of "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); Pet. App. 148a-149a.

The Commission issued regulations concerning the carriage of programming on PEG channels in its *Second Report and Order*. Pet. App. 178a-202a. The agency again rejected the contention that by authorizing private cable operators to choose to prohibit certain programming on PEG channels, the statute and the implementing regulations violated the First Amendment. Pet. App. 181a-183a. The Commission

also construed the statute's coverage of programming containing "sexually explicit conduct" to mean that the programming must be "indecent." Pet. App. 186a-187a. The Commission found such a construction to be reasonable, "given the purpose underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to 'indecent' programming on cable access channels." Pet. App. 187a.

3. Petitioners, a number of cable programmers and organizations of listeners and viewers, filed petitions for review of the Commission's orders in the court of appeals, contending that Section 10 and its implementing regulations violated their rights to free speech under the First Amendment.

a. After staying the regulations pending review, a panel of the court invalidated Sections 10(a) and 10(c). Pet. App. 111a. The panel held that, because those provisions permitted cable operators to ban indecent leased access and PEG programming, the operators' decisions to do so should be attributed to the federal government as "state action." Pet. App. 108a. The panel remanded the issue of the constitutionality of Section 10(b)'s segregation and blocking scheme for leased access channels to the Commission for further consideration in light of its invalidation of Sections 10(a) and 10(c). Pet. App. 122a-125a.

b. The appeals court subsequently vacated the panel opinion, heard the case *in banc*, and issued a judgment upholding Section 10 and the regulations. Pet. App. 2a-89a.

The full court held that the decision by cable operators to prohibit indecent leased access or PEG programming permitted by Section 10 is not "state

action" to which the First Amendment applies. Pet. App. 31a. The court emphasized that the statute does not "command" cable operators to prohibit indecent programming. Pet. App. 12a. Instead, the court explained, the statute "gives them a choice" (Pet. App. 18a); operators "may carry indecent programs on their access channels, or they may not." Pet. App. 12a. As the court explained, that is the same choice that cable operators have with respect to all other cable channels they carry. Pet. App. 14a.

The court also concluded that the statute does not provide such "significant encouragement" to the decision by any cable operator to ban indecent access programming that "state action must be found." Pet. App. 19a. As the court recognized, "'[m]ere approval of or acquiescence in the initiatives of a private party' * * * cannot 'justify holding the State responsible for those initiatives.'" Pet. App. 22a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)). The court also found that it would be inappropriate to assume that the costs associated with Section 10(b)'s segregation and blocking scheme would cause cable operators to ban indecency from their access channels. Pet. App. 23a-25a. As the court explained, "[n]othing in section 10 specifies that [such costs] * * * must be borne by cable operators," and the FCC "has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation." Pet. App. 24a. The court stated that "[i]n deciding this facial challenge to the regulations we are unwilling to speculate about the outcome of those proceedings." Pet. App. 25a.

In addition, the court determined, any effect that Section 10(d)'s removal of immunity for the carriage of obscene programming would have on an operator's programming decision would not support attribution of the operator's decision to ban indecent programming to the government. Pet. App. 26a-27a. The court observed that because obscene cable programming is constitutionally unprotected, Congress has the power to ban such programming altogether. The court noted that "Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control." Pet. App. 27a. If "a cable operator takes this into account in deciding which programs to carry—on any channel," that fact could not "convert its refusal to carry indecent programming into state action."

The court determined, moreover, that leased access and PEG channels are not "public forums" for First Amendment purposes, since they are neither owned by the government, Pet. App. 29a, nor "so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system." Pet. App. 31a. The court found that the 1992 Act's leased access and PEG obligations are akin to common carrier requirements, which have never been thought to transform a private entity's decisions into those of the government. *Ibid.*

The court held that Section 10(b)'s segregation and blocking scheme constitutes state action, but is the least restrictive means of accommodating "two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in

having access to such material." Pet. App. 33a. The voluntary use of lockboxes would not be an effective alternative, the court determined, since it would present cable viewers with "two, equally unacceptable options." Pet. App. 35a. Because such channels are controlled by no single editor, viewers either would have to "continually activate and deactivate" the lockboxes, "inevitably risking a slip up or a lapse that would expose their children to indecency," or they would have to "install lockboxes permanently, thereby giving up leased access programming altogether." *Ibid.*

The court rejected petitioners' arguments that Section 10 unconstitutionally discriminates against leased access programming, because it does not impose a similar segregation and blocking scheme on PEG or commercial cable channels. The court explained that leased access channels are unlike commercial channels, not only because no single editor is responsible for what is shown on leased access channels, but because indecency on other channels is generally shown only upon request and for a premium payment. Pet. App. 40a-41a. The court acknowledged that PEG channels "are comparable" to leased access channels in this respect, but found that PEG channels "did not pose dangers on the order of magnitude of those identified on leased access channels." Pet. App. 40a.

Finally, the court concluded, the statute's indecency standard is not impermissibly vague, noting that the standard tracks the Commission's generic definition of indecency, which this Court had re-

viewed and upheld in *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). Pet. App. 42a-43a.[4]

ARGUMENT

The decision below is the first by any court of appeals to address the constitutionality of Section 10 and its implementing regulations. The decision does not conflict with that of any other court of appeals and correctly disposes of the issues presented by this case.[5] Further review is therefore not warranted.

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[4] Only Judges Wald and Tatel dissented in full from the *in banc* decision. Pet. App. 44a-76a. Judge Edwards found that Sections 10(a) and 10(b), read in tandem, impose an unconstitutional burden on speech, but sided with the majority as to Section 10(c), concluding that the provision "merely returns some editorial control to cable operators," which is "not the least bit objectionable." Pet. App. 78a. Judge Rogers agreed with the dissenters only with regard to Section 10(b); she would have, after severing that provision, upheld the rest of the statute. Pet. App. 88a.

[5] Petitioners in Denver Area Educational Telecommunications Consortium, et al. (collectively, DAETC), complain that the decision below conflicts with the decision of the district court in *Altmann* v. *Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994), which granted a partial preliminary injunction against enforcement of Sections 10(a) and 10(c) of the 1992 Act (but upheld Section 10(b) as constitutional). The conflict between a decision of a court of appeals and that of a district court does not warrant this Court's review. In any event, the *Altmann* court, which has so far examined Section 10's constitutionality only for purposes of preliminary relief, did not have the benefit of the *in banc* decision in this case and remains free to reexamine its conclusion before it renders final judgment.

We note also that the district court in *Goldstein* v. *Manhattan Cable Television, Inc.*, No. 90 CIV 4750 (S.D.N.Y. Sept. 20, 1995), granted a preliminary injunction to a leased access programmer to prohibit a cable operator from segregating the

1. A governmental entity "'normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed that of the [government].'" *San Francisco Arts & Athletics* v. *United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (quoting *Blum*, 457 U.S. at 1004). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Blum*, 457 U.S. at 1004. Accord *San Francisco Arts & Athletics*, 483 U.S. at 547. In this case, nothing in Section 10 compels cable operators to prohibit indecent programming on leased access or PEG channels, or so significantly encourages operators to do so "that the choice in law must be deemed that of the [government]."

By its terms, Section 10(a) of the 1992 Act "permit[s]" cable operators to enforce a written and published policy of prohibiting indecent programming

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programmer's indecent programming and making it available only to subscribers who request access to it. Although the district court indicated—without any elaboration—its general agreement with Judge Wald's dissenting opinion in this case (slip op. 7), the court also noted that it believed that the case before it was stronger in a number of respects than this case. See slip op. 7-10. In addition, a stipulation entered into by the cable operator provided an independent basis for the preliminary injunction in *Goldstein* that has nothing to do with this case. See slip op. 10-16. In any event, any conflict between the district court's preliminary injunction decision in *Goldstein* and the court of appeals' final judgment in this case would not warrant review by this Court. Indeed, the pendency of *Goldstein* and *Altmann* in the district courts in the Second and Ninth Circuits suggests that further review in this Court of the issues common to all three cases can await the development, if any, of a conflict among the circuits on those issues.

on leased access channels. 47 U.S.C. 532(h) (Supp. V 1993). Section 10(c) of the 1992 Act similarly provides that the Commission should "enable" cable operators to prohibit the use of PEG channels for indecent programming. See note following 47 U.S.C. 531 (Supp. V 1993). In short, as the court of appeals recognized, "sections 10(a) and 10(c) do not command. Cable operators may carry indecent programs on their access channels, or they may not." Pet. App. 12a. Accord Pet. App. 18a ("Rather than coerce cable operators, section 10 gives them a choice."). Those provisions simply restore to cable operators the right—which they enjoy with respect to all other cable channels that they carry—to employ their equipment and franchises to carry or not carry indecent programming, in their discretion.

Petitioners contend that state action "is inherent in the creation of the * * * laws and regulations that are the subject of this litigation." Alliance Pet. 15. See DAETC Pet. 19. We do not dispute that Sections 10(a) and 10(c) are federal statutes, enacted and implemented as the result of governmental action. But the mere enactment of those provisions does not limit the speech of any individual or entity. Insofar as cable operators continue to carry indecent access programming, Sections 10(a) and 10(c) would have no effect on free speech rights. The only possible First Amendment effect of those provisions would occur if and when cable operators decide not to carry indecent access programming. The question presented, therefore, is whether such decisions by cable operators would be properly attributable to the government. Since nothing in Section 10(a) or 10(c) interferes with the cable operators' discretion in deciding whether to

carry indecent access programming, those decisions —if they are made—could not be said to be the result of state action.

To be sure, without Sections 10(a) and 10(c), cable operators would not have had the authority to prohibit indecent access programming. But such authorization was necessary only because federal law had in 1984 generally removed cable operators' editorial control over access channels. The 1992 Act simply seeks to restore the ability of cable operators to control the carriage of indecent programming on their cable systems, a power that, prior to access requirements, could not have been thought to have given rise to state action. As the court of appeals observed, "[t]o suppose that whenever Congress restores to cable operators editorial discretion an earlier statute had removed, the operators' exercise of this discretion becomes state action subject to the First Amendment, not only would disable the legislature from correcting what it perceives as mistakes in legislation, but also would deter it from experimenting with new methods of regulating." Pet. App. 15a.

Petitioners also maintain that state action is present because Sections 10(a) and 10(c) preempt contrary state law, relying on *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956). DAETC Pet. 19-20; Alliance Pet. 17-19. Unlike *Hanson*, however, federal law does not provide the "source" of the cable operator's "power and authority" to control indecent programming over access channels. 351 U.S. at 232. Instead, an operator's power to control the programming carried over its cable system stems from its ownership of the system; Sections 10(a) and 10(c)

simply remove an obstacle to the operator's exercise of its ownership rights that was put into place, as a matter of federal law, by the 1982 Act.

Moreover, since *Hanson*, this Court has made clear that the actions of private parties cannot be attributed to the government unless there is a "sufficiently close nexus" between the private party's actions and those of the government such that the actions of the private party can fairly be attributable to the government. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). That federal law permits a party to take an action free from state interference does not make that action attributable to the government; on the contrary, it supports the inference that the action should not be attributed to the government at all.

Petitioners Alliance for Community Media, et al. (collectively Alliance) contend that the 1992 Act encourages cable operators to prohibit indecent programming on their leased access and PEG channels, focusing on Section 10(d)'s removal of operators' immunity for the carriage of access programming that "involves obscene materials." Alliance Pet. 20-21. See 47 U.S.C. 558 (Supp. V 1993). It is well settled, however, that the government may prohibit obscene speech, since such speech falls outside the protections of the First Amendment. See, *e.g.*, *Sable Communications, Inc.* v. *FCC*, 492 U.S. 115, 124 (1989). The fact that cable operators are now subject to such prohibitions with respect to their access channels—as they previously were with respect to all other channels they operate—does not provide a special incentive to operators to ban indecent programming that is not obscene. In any event, "[s]ome self-censorship is an inevitable result of all

obscenity laws." *Carlin Communications* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 n.6 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988). See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60 (1989). And private parties make private decisions against a backdrop of criminal laws and obscenity statutes every day. As the court of appeals recognized (Pet. App. 27a), the fact that they take such laws into account does not transform their decisions into those of the state. *Carlin*, 827 F.2d at 1297 n.6.

Finally, petitioners contend that the First Amendment applies to any decision by a cable operator to refuse to carry indecent access programming, because access channels are "public forums." Alliance Pet. 23-25; see DAETC Pet. 20-21 n.11. As the court of appeals correctly discerned, the public forum doctrine derives from efforts to address the "issue of when the First Amendment gives an individual or group the right to engage in expressive activity on *government* property." *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) (emphasis added). The access channels in this case are plainly not government property.

As the court of appeals explained, "[t]he [access] channels belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." Pet. App. 29a. To be sure, there are constraints (removed only in part in 1992) on the control a cable operator may exercise over access channels on its system. Those constraints, however, at most impose common carrier obligations on

operators, as the Commission and the court of appeals found. Pet. App. 31a; Pet. App. 139a-140a. And just as a heavily regulated utility may take action without having its decision attributed to the state, *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 358-359 (1974), so too a common carrier of information does not act as the government when it distinguishes between speech on the basis of its content. See, *e.g.*, *Sable Communications* v. *FCC*, 492 U.S. at 133 (Scalia, J., concurring) ("We do not hold that the Constitution requires public utilities to carry [indecent speech]."); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 877 (9th Cir. 1991) ("a telephone carrier may * * * ban 'adult entertainment' from its network"); *Carlin Communications*, 827 F.2d at 1297 (carrier generally under no constitutional restraints in its policy of banning all "adult" programming from its network).[6]

2. The court of appeals also correctly concluded that Section 10(b)'s segregation and blocking scheme is the least restrictive means of advancing the government's compelling interest in protecting children from indecent programming. Pet. App. 36a.

a. Petitioners assert that cable "lockboxes"—devices that parents can use to block out the receipt of cable programming on selected channels (including, but not limited to, access channels) for particular

[6] Petitioner Alliance contends that the appeals court's failure to treat private property under the public forum doctrine conflicts with *City of Jamestown* v. *Beneda*, 477 N.W.2d 830 (N.D. 1991), which reversed trespass convictions in a North Dakota shopping mall on First Amendment grounds. In finding the Constitution applicable, however, the *Beneda* court expressly relied upon the fact that the mall in question was publicly owned. 477 N.W.2d at 835.

periods of time—are a less restrictive means of providing the same protection. DAETC Pet. 23-24; Alliance Pet. 26-27. As the court of appeals recognized, however, leased access programming "may come from a wide variety of independent sources, with no single editor controlling [its] selection and presentation." Pet. App. 34a-35a (quoting *First Report and Order*, 8 FCC Rcd 998, 1000 ¶ 15 (1993)). Thus, in order to avoid exposing their children to indecent programming, "subscribers would have two, equally unacceptable options." *Ibid.* They could "continually activate or deactivate their lockboxes, inevitably risking a slip up or a lapse that would expose their children to indecency." *Ibid.* Or they could lock out leased channels permanently, "thereby giving up leased access programming altogether." *Ibid.* Thus, a system of voluntary blocking based on lockboxes imposes special burdens on subscribers that are not imposed by Section 10(b)'s mandatory blocking and segregation scheme.

Moreover, because the effective use of lockboxes depends upon parental vigilance and initiative to shield minors from indecent programming, that method risks much greater access to indecent materials than the segregation and blocking scheme imposed by Section 10(b). As the courts that have upheld the constitutionality of the government's efforts to protect children from indecent telephone messages (so-called "dial-a-porn") have concluded, voluntary blocking "would not even come close" to eliminating the access of minors to indecent messages. *Dial Information Services* v. *Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); see also *Information Providers'*

Coalition v. *FCC*, 928 F.2d 866, 873 (9th Cir. 1991) (upholding Commission's finding that "voluntary blocking would not be an effective means of limiting minors' access to dial-a-porn services"). Finally, Section 10(b) imposes a "minimal[]" burden on those adults who desire to watch indecent leased access programming. Pet. App. 35a. The statute's segregation and blocking scheme does not forbid any adult subscriber from receiving indecent programming; it merely conditions receipt upon a request. 47 U.S.C. 532(j)(1)(B) (Supp. V 1993).

b. Petitioners also complain that the legislative record is insufficient to support Congress's choice of a segregation and blocking scheme over use of lockboxes. DAETC Pet. 23; Alliance Pet. 25. But Section 10(b)'s segregation and blocking scheme was based on similar blocking requirements used to control children's access to dial-a-porn. See 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). In the dial-a-porn arena, experience had proved voluntary blocking alternatives ineffective. See *Dial Information Services* v. *Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 873 (9th Cir. 1991). Congress could reasonably draw upon the knowledge gained in constructing that analogous legislation to conclude that a similar voluntary method of attempting to protect children from indecent leased access programming would not as effectively achieve its goals.

c. Petitioner DAETC asserts that Section 10(b) is unjustifiably "underinclusive" because it applies to indecent programming on leased access channels but not on commercial channels. DAETC Pet. 22. But

the problem of an unwilling subscriber being confronted with indecent programming is far more acute on leased access channels. Unlike commercial channels, leased access channels are not controlled by a single editor, but instead carry programming from a wide variety of sources; "[w]hat will appear on these channels, and when, is anyone's guess." Pet. App. 40a. Moreover, much of the indecent programming carried on non-access channels is provided through "per-program or per-channel services that subscribers must specifically request in advance," and that therefore provide the functional equivalent of Section 10(b)'s segregation and blocking requirement. Pet. App. 40a-41a (quoting *First Report and Order*, 8 FCC Rcd at 1001 ¶ 19 n.20). Indeed, as the court of appeals observed, had Congress imposed controls of this type beyond the area where the problem it was addressing—exposure of children to indecency—existed, its action would have presented distinct First Amendment problems. Pet. App. 41a. In short, "there is no constitutional rule forbidding Congress from addressing only the most severe aspects of this problem, and there are constitutional doctrines, such as narrow tailoring and least restrictive means, that may have constrained it from going further than necessary." Pet. App. 41a.

e. Finally, the definition of indecent programming employed by Section 10 and the Commission's implementing regulations is not unconstitutionally vague, as petitioner DAETC contends. DAETC Pet. 12-16.

The statute and the regulations define indecent programming to mean "programming * * * that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by

contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); see 47 U.S.C. 532(h) (Supp. V 1993). That definition is virtually identical to the Commission's generic definition of indecency, differing only insofar as it is tailored to the "cable medium." In the area of broadcast regulation, this definition has repeatedly been upheld as being "sufficiently defined to provide guidance to the person of ordinary intelligence in the conduct of his affairs." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1340 (D.C. Cir. 1988); *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991), cert. denied, 503 U.S. 913 (1992); see *FCC* v. *Pacifica Found.*, 438 U.S. 726 (1978). And tailoring the definition to other mediums (such as telephones) does not render the definition any more subject to vagueness concerns. *E.g., Dial Information Servs.*, 938 F.2d at 1540-1541; *Information Providers' Coalition*, 928 F.2d at 875. See also *Sable Communications* v. *FCC*, 492 U.S. 115 (1989).

DAETC contends that its vagueness concerns are accentuated by Section 10(b)'s reference to a cable operator's "reasonable belief" that the programming at issue is indecent. DAETC Pet. 12-13. Far from expanding the category of what may be found subject to the statute, however, the requirement underscores that the operator may not exercise his editorial control unless his belief that the material at issue is indecent is objectively "reasonable."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

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—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully submit this reply to the government's brief in opposition to address certain errors of law and fact.

ARGUMENT

I.

THE GOVERNMENT MISSTATES THE QUESTION PRESENTED IN AN ATTEMPT TO SUGGEST THAT THE CONSTITUTIONALITY OF CABLE OPERATORS' DECISIONS IS AT ISSUE, RATHER THAN THAT OF A FEDERAL STATUTE.

Petitioners challenge section 10, which singles out disfavored speech and delegates the power to censor that speech to cable operators, and the censorship requirements it imposes on those cable operators. Because section 10 is an act of Congress, it is subject to constitutional scrutiny.

In order to avoid such scrutiny, the government attempts to label the speech-limiting impact that section 10 will predictably have — and that it was *intended* to have[1] — as something other than the product of governmental action by mischaracterizing these proceedings as a challenge to cable operators' private censorship decisions. *E.g.*, Opp. at i (rewriting the petition's second question presented as "[w]hether a cable operator's decision to prohibit indecent programming . . . is 'state action'").

The questions posed in these proceedings have always focused, instead, on Congress' content-based delegation that encourages and indeed pressures cable operators to make those censorship decisions and on the government's participation in the censorship scheme. The question here is not whether a particular act of censorship violates the First Amendment or relevant statutes, as in a case recently decided in New York City,[2] but rather whether Congress can delegate to the enemies of cable access channels the power to censor disfavored speech that it could not grant directly to government officials.

The government evades admitting that section 10 is a content-based statute: one that authorizes censorship of speech that Congress has deemed to be offensive based squarely on its content and whose intended and inevitable impact is to diminish the quantity of such speech that willing speakers would

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[1] Indeed, Senator Helms plainly stated that the purpose of section 10's liability provision is to "put an end to the kind of things going on" on cable access channels, 138 CONG. REC. S652 (daily ed. Jan. 30, 1992), and Senator Fowler stated that indecent programming "should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it," *id.* at S649.

[2] *Goldstein v. Manhattan Cable Television, Inc.*, No. 90 Civ. 4750, 1995 WL 562182 (S.D.N.Y. Sept. 20, 1995) (finding plaintiffs had a likelihood of success on statutory and constitutional claims and entering preliminary injunction against cable operator's plan to scramble leased access programs allegedly pursuant to section 10).

otherwise offer to willing listeners. The government does acknowledge that section 10 is a federal statute "enacted and implemented as the result of governmental action," but attempts to minimize the consequences of that fact with the conclusory assertion that "the mere enactment of those provisions does not limit the speech of any individual or entity." Opp. at 12. This is plainly false.

Section 10 directly limits the provision of "indecent" speech on leased access channels and the receipt of such speech by persons who would otherwise receive it, because it authorizes censorship that would be unlawful but for its passage. In every instance that cable operators (who have for many years been hostile to the entire enterprise of access channels) do not ban such protected speech under section 10(a), Congress requires them to segregate and block that speech under section 10(b), depriving willing viewers of such speech absent the kind of "affirmative act" this Court held impermissible in *Lamont v. Postmaster General*, 381 U.S. 301, 306-07 (1965). The government is also directly involved in all censorship of "indecent" programming on PEG and leased access channels pursuant to sections 10(a) and (c), because it defines the censored category of speech and prescribes the censorship procedures. *See* Pet. at 17-19.

Section 10, thus, presents one of the very type of "regulations that suppress, *disadantage, or impose differential burdens upon* speech because of its content" that this Court recently held require strict First Amendment scrutiny. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2458-59 (1994) (emphasis added).

Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), which the government does not and cannot distinguish, also makes plain that section 10 is subject to constitutional scrutiny. In *Skinner*, this Court specifically held that a statute that merely permits, but does not compel, private drug testing nevertheless gives rise to constitutional scrutiny because, as in

this case, "the Government did more than adopt a passive position towards the underlying conduct." *Id.* at 615. The conflict between the court of appeals' decision and *Skinner* warrants this Court's review.

II.

THE GOVERNMENT RELIES UPON INAPPOSITE CONGRESSIONAL FINDINGS TO SUPPORT ITS POSITION.

It is well-established that in First Amendment cases courts cannot simply defer to Congress; the government has the burden of meeting the compelling state interest/least restrictive means test. *E.g.*, *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 130 (1989) (statute struck down where no congressional findings existed on the ineffectiveness of extant regulation).

The government attempts to distract the Court from Congress' lack of any findings regarding indecency on cable by focusing on findings regarding a completely different medium, telephones. Opp. at 18 (section 10(b) is "based on similar blocking requirements used to control children's access to dial-a-porn," and "Congress *could* reasonably draw upon the knowledge gained in constructing that analogous legislation") (emphasis added).[3]

However, especially where, as here, Congress did not even consider the most obvious and constitutionally unproblematic alternative — scrambling "indecent" programming *at a particular subscriber's request* — the telephone-related findings that the government cites are entirely inapposite and cannot govern the fact-specific least restrictive means inquiry as to section 10. Indeed, the telephone medium has technological capabilities and practical configuration wholly different from the

[3] *See* Opp. at 17 (courts upholding dial-a-porn restrictions concluded that "voluntary blocking 'would not even come close' to eliminating the access of minors to indecent messages" over the telephone).

cable medium. *See* Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 4926 (1990). For example, in the telephone medium, it is not technologically practical to use voluntary blocking because of the extremely large number of dial-a-porn numbers and the ease of creating or switching to new numbers. By contrast, cable lockboxes present a proven means of voluntary blocking because there are only a few access channels on any given cable system and cable operators rarely reallocate channel numbers. Moreover, outside of the home, children have ready access to unsupervised telephones, but the same is not true of cable. *See* Pet. App. at 68a-69a.

The government has not drawn the Court's attention to, nor do there exist, any of the specific findings as to cable and indecency that it references as to telephones and "dial-a-porn." There are not even any findings that cable is so analogous to telephones that it should be similarly regulated. Neither set of findings can be implied, as the government attempts to do, for this Court has always emphasized that the specifics of each medium of communication require individual treatment. *E.g.*, *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) ("each medium of expression presents special First Amendment problems").

III.

THE GOVERNMENT'S BRIEF IN OPPOSITION DEMONSTRATES THE IMPORTANCE OF RESOLVING THE ISSUES PRESENTED IN THE PETITION.

The government argues that section 10 is not subject to constitutional scrutiny because it only empowers cable operators to censor protected speech and only "restores" the law to a previous state that cannot be attributed to governmental action. Opp. at 11-16. This position, accepted by the majority of the court of appeals, creates for Congress a huge loophole through

which it may regulate without regard for constitutional principles.

If this loophole is not closed, then Congress — in the name of "restoring" previous rights — could, with complete immunity from constitutional scrutiny, enact legislation authorizing cable operators to censor all speech by Jews, or Latinos, or welfare recipients on access channels; authorizing telephone companies with common carrier obligations to censor political speech by fundamentalists; or authorizing private employers to discriminate against African-Americans who maintain dissenting political views (thereby "restoring" some of what Title VII took away).[4]

Pursuant to the government's argument and the court of appeals' holding, each of those laws would be exempt from constitutional challenge because courts would look only to the private entity inflicting the censorship, regardless of the permissibility of the legislated lines drawn or the predictable and intended effect of the legislation. For this reason alone, the Court should grant the petition and resolve whether Congress may act without impediment in such a novel fashion.[5]

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[4] Nor is the principle animating the court of appeals' holding limited to legislation permitting censorship. Congress could, by "restoring" a portion of authority previously denied, authorize — without constitutional scrutiny — banks to discriminate against Asian-Americans in providing mortgages, native-American tribes to reclaim land currently owned by the original governmentally approved title holder, and airlines to prohibit transportation of Muslim religious articles. Because the "ultimate" discrimination in each instance would be undertaken by a private party, there would be no state action, and the legislation delegating that power to discriminate would be unreviewable.

[5] The government's "restoration" argument is also factually baseless. Section 10 does not restore to cable operators a power they possessed as a consequence of "ownership rights" prior to enactment of the 1984 Cable Act, as if every channel were a page in THE

(continued...)

The government's invitation to this Court to wait and allow courts to consider further section 10 after it goes into effect, *see* Opp. at 11 n.5 — even if it were otherwise sound with respect to the constitutional merits — ignores the fact that this case is the *only* challenge to the rulemaking with which this Court will ever be presented. *See* 28 U.S.C. § 2344. Nor is there merit to waiting for further factual development in the lower courts on the state action issue, which presents a pure question of law. The decision and analysis below are squarely in conflict with *Skinner* and *Railway Employees' Dep't v. Hanson*, 351 U.S. 225 (1956), and allowing the decision below to stand, to be applied subsequently by lower courts and to be taken advantage of by Congress, would cause chaos in the cable industry and result in a plethora of unnecessary litigation to redress the attendant impact on constitutional and statutory rights.

If the petition were denied and section 10 were allowed to go into effect, the magnitude of the censorship and self-censorship that would occur before the courts could address section 10 in the manner suggested by the government would be immeasurable and constitutionally intolerable. The interim self-censorship would never be remedied, and courts around the nation are likely to be inundated with suits by cable programmers and viewers. Therefore, the Court should resolve these issues before section 10 — which clearly cannot withstand strict scrutiny, as even admitted in part by the government, *see* Pet. App. at 11a, 32a, 104a n.9 — is allowed to go into effect.

---

[5](...continued)
MIAMI HERALD subject to their unfettered discretion. Opp. at 13. Even prior to 1984, most cable franchises (such as those in New York State) required, by law in some states, the set-aside of cable access channels and prohibited content censorship thereon. *See, e.g.*, N.Y. Exec. L. § 829. Thus, section 10 does not return what federal law took away; rather, it overrides local law and grants cable operators a content-based censorship power that they never had.

CONCLUSION

For all the foregoing reasons and for all the reasons stated in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,
Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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102 pp

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EDITOR'S NOTE

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RELEVANT DOCKET ENTRIES

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 93-1169, 93-1171, 93-1270, 93-1276

February 22, 1993	Petitions for review filed in nos. 93-1169 and 93-1171.
April 7, 1993	Stay of First Report and Order granted.
April 15, 1993	Petition for review filed in no. 93-1270.
April 20, 1993	Petition for review filed in no. 93-1276.
May 7, 1993	Stay of Second Report and Order granted.
November 23, 1993	Opinion and judgment filed.
February 16, 1994	Suggestion for rehearing in banc granted and judgment vacated.
June 6, 1995	In banc opinion and judgment filed.
July 10, 1995	Stay of issuance of mandate granted.

Before the

FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C.

Implementation of Section 10 of the Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-258
Indecent Programming and Other Types of Materials on Cable Access Channels	)	

COMMENTS OF ACTON CORP. ET AL.

* * *

I. The Commission Must Clarify That Voluntary Prohibitions On Leased Access Programming Are Based On The Exercise Of The Operator's Editorial Judgment And That Operators May Fashion Appropriate Individual Policies

The first provision of Section 10 authorizes cable operators to impose certain voluntary restrictions on leased access programming. The *Notice of Proposed Rulemaking* ("*NPRM*") suggests this area is self-executing and requires no Commission action. But the Commission could greatly advance the public interest by taking this opportunity to clarify the statutory language in furtherance of Congress' underlying objectives.

There are several critical points that the Commission should expand upon. First, the statute wisely provides that any decision about the carriage of "offensive" programming is to be made on the basis of the operator's "judgment." The critical question is *not* whether a particular program *is* "obscene . . . lewd, lascivious, filthy, or indecent or otherwise unprotected by the Constitution of

the United States," but whether the cable operator *believes* the programming falls into that category.

* * *

Despite the concerns underlying Section 10, most cable operators carry relatively little indecent programming on leased access channels. Although the statute talks about a single blocked "channel," the Commission should clarify that so long as the offensive programming is blocked, the channel need not be blocked on a 24 hour per day basis. Rather than devote an entire channel for this purpose, an operator might chose to maintain a single leased access channel and simply scramble the "indecent" portions of the programming to every subscriber who has not affirmatively requested it. We submit this approach is entirely consistent with Section 10(b), and enhances utilization limited channel capacity.

Finally, the Commission should make clear that the costs associated with establishing and maintaining a "blocked" channel should be borne by leased access providers of indecent programming. The Commission should incorporate that finding into its future rulemaking regarding reasonable rates, terms, and conditions for leased access use.

* * *

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JOINT COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION AND PEOPLE FOR THE AMERICAN WAY

These comments are being jointly filed by The Alliance for Community Media (formerly the National Federation of Local Cable Programmers), The Alliance for Communications Democracy, The American Civil Liberties Union, and People for the American Way. These four non-profit corporations represent organizations and individuals who use public, educational or governmental ("PEG") and leased access channels either as programmers or as viewers, Their comments are submitted in response to the Notice of Proposed Rulemaking adopted by the Commission on November 5, 1992 and released on November 10, 1992, whereby the Commission proposes to promulgate a rule pursuant to Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992). The Commission's Proposed Rule is contained in Appendix A of its Notice. It would place restrictions on PEG programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." It would also

place restrictions on allegedly "indecent" programming on leased access channels.

BACKGROUND

These commenters fully support the goal that apparently underlies Section 10 and the Commission's Proposed Rule — the protection of minors from cable programming that their parents find unsuitable for children. However, for a variety of reasons, we cannot support the regulatory mechanism chosen by Congress and the Commission. Before stating our objections, we place Section 10 and the Commission's Proposed Rule in context.

A. The 1984 Act. — The Cable Communications Policy Act of 1984 ("the 1984 Act") added Title VI to the Communications Act of 1934. As Congress's first direct legislation concerning cable, the 1984 Act was in part concerned with deregulating cable rates, which was thought necessary to encourage prosperity in an emerging industry. See generally H.R. Rep. No. 628, 102d Cong., 2d Sess. 28-29 (1992).

At the same time, Congress was equally concerned with preventing local cable operators from exercising sole programming choice. These operators are often owned by media conglomerates that also have ownership interests in the programmers chosen by their cable subsidiaries. Even when programmer ownership is not an issue, "cable conglomerates have shown themselves to be capable of using their dominant position in electronic media distribution to obtain economic advantages from those program channels they agree to deliver, and to allow these financial considerations to dictate which particular communication options to offer the public they ostensibly serve." Don R. LeDuc, *"Unbundling" the Channels: A Functional Approach to Cable TV Legal Analysis*, 41 Fed. Comm. L.J. 1, 8 (1988).

To that end, Congress incorporated into the 1984 Act leased access provisions that require a cable operator to "designate channel capacity for commercial use by persons unaffiliated with the operator." 47 U.S.C. § 532(b)(1). This legislation specified that "[a] cable operator shall not exercise any editorial control over any video programming provided" over leased access channels. 47

U.S.C. § 532(c)(2). According to the legislative history of that Act,

> "A requirement that channels be set aside for third-party commercial access separates editorial control over a limited number of cable channels from the ownership of the cable system itself. Such a requirement is fundamental to the goal of providing subscribers with the diversity of information sources intended by the First Amendment." H.R. Rep. No. 934, 98th Cong., 2d Sess. 31 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4668.

Congress was not only worried about financial disincentives. Leased access was also viewed as a way to insure subscribers "programming which represents a social or political viewpoint that a cable operator does not wish to disseminate." *Id.* at 48, 1984 U.S.C.C.A.N. at 4685.

The 1984 Act also included provisions that allow local franchising authorities to establish PEG access channels. By then, PEG had a long history of having been incorporated by local authorities into their franchise agreements. The earliest public access channels had appeared in the early 1960's, see Daniel L. Brenner *et al.*, *Cable Television and Other Nonbroadcast Video* § 6.04[2], at 6-32 (1992), and by 1969 the Commission had issued an order in part "encouraging" PEG, FCC 69-1170, 20 F.C.C.2d 201, 206-07 (1969). The 1984 Act thus did not create PEG; rather, it ratified the efforts in this area by localities across the country, and it assured other franchising authorities of their ability to require PEG channels in their franchise agreements.

PEG, as is true of leased access, addresses the bottlenecking that occurs when operators impede subscriber access to the full variety of cable programming, whether out of commercial concerns or hostility to diverse programming. Congress therefore specified that "a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity." 47 U.S.C. § 531(e). In doing so, Congress purposefully recognized that PEG was a public forum:

> "Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas." H.R. Rep. No. 934, *supra*, at 30, 1984 U.S.C.C.A.N. at 4667.

While thus seeking to assure the greatest diversity of cable programs, the 1984 Act was also concerned with protecting unsupervised children from all types of cable programming — be it on general or access channels — that their parents found unsuitable. Congress therefore enacted a "lockbox" provision, now codified at 47 U.S.C. § 544(d)(2)(A), which requires all cable operators to make lockboxes available to their subscribers. According to the legislative history of the 1984 Act, Congress

> "recognize[d] with respect to cable the need to provide for the restriction, within constitutionally permissible grounds, on the availability of programming, which might not be obscene, but is nonetheless indecent, if children are going to be adequately protected from exposure to such material. Thus, [47 U.S.C. § 544(d)(2)(A)] provides one method for dealing with obscene or indecent programming by requiring every cable operator to provide to any subscriber upon request a device (often referred to as a 'lock box') which is capable of restricting the viewing, during any period selected by the subscriber, of a cable service which contains obscene or indecent programming. The Committee believes that the requirement that these devices be furnished (by sale or lease) by the cable operator provides one means to effectively restrict the availability of such programming, particularly with respect to child viewers, without infringing the First Amendment rights of the cable operator, the cable programmer, or other cable viewers." *Id.* at 70, 1984 U.S.C.C.A.N. at 4707.

Thus, in 1984, Congress specifically accounted for the first amendment rights of programmers and viewers when it adopted lockboxes as the least restrictive means for effectively protecting children. Pursuant to court order, see *ACLU v. FCC*, 823 F.2d

1554, 1579 (D.C. Cir. 1987). *cert. denied*, 485 U.S. 959 (1988), the Commission has subsequently required that lockboxes be capable of blocking all channels carried on a cable system, including PEG and leased access channels. See FCC 87-306, 2 F.C.C.R. 5893, ¶ 9, at 5894 (1987).

B. PEG and Leased Access.[1] — PEG access channels have by any measure abundantly fulfilled the hope that they would become a robust "electronic marketplace of ideas" in those communities where they are provided for and supported with adequate resources.[2] First, PEG programming is a widely diverse mix from numerous sources. Some 2,000 centers produce about 10,000 hours of local programming a week. *Cable Television Regulation (Part 2), 1990: Hearings on H.R. 4415 Before the U.S. House of Representatives Subcomm. on Telecommunications and Finance of the Comm. on Energy and Commerce*, 101st Cong., 2d Sess. (1990) (testimony of Sharon Ingraham, on behalf of the National Federation of Local Cable Programmers). An annual video festival known as the Hometown USA Video Festival is dedicated to showcasing the best of local origination and PEG channel productions, and in 1990 it attracted 2,100 entries from 360 cities in 41 states. Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. Comm. 52, 58 (1992) [hereinafter *Cable Television*] (App., Exh. A).

Second, access channels are widely viewed in those communities where they are available. Approximately 30 million

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[1] The description that follows is based in very large measure on Patricia Aufderheide, *Cable Television and the Public Interest*, 42 J. Comm. 52, 58-60 (1992), which is included in the Appendix that is presented with these comments (hereafter, "App.") as Exhibit A. Dr. Aufderheide teaches in the School of Communication at The American University of Washington, D.C., and greatly assisted in the preparation of these comments.

[2] The robust quality of access programming has attracted a great deal of press attention. See App., Exh. B & C (examples of articles). Indeed, cable operators have often touted access channels when trumpeting the public good furthered by their systems. See App., Exh. D-G.

homes or 70 million people are provided with an access channel on their cable system. Margie Nicholson, *Cable Access: A Community Communications Resource for Nonprofits*, Bull. 3 (Benton Found., Washington, D.C.), Apr. 1990, at 7 [hereinafter *Cable Access*].

> "One multisite study shows that 47% of cable viewers watch community access channels, a quarter of them at least three times in two weeks; 46% say it was "somewhat" to "very" important in deciding to subscribe to or remain with cable. [Frank Jamison, *Community Programming Viewership Study Composite Profile* (1987) (App., Exh. H).] Another study, commissioned by Access Sacramento, showed that two-thirds of cable subscribers who knew about the channel watched it. [Access Sacramento, *1991 Audience Survey Findings Report* (1991) (App., Exh. I).]" *Cable Television, supra*, at 58.

Similarly, Northwest Community Television found that 50% of subscribers who could receive their programming watched it "frequent[ly]" or "occasional[ly]," and 46% rated this programming "very valuable" or "somewhat valuable." William Morris, *Northwest Community Television Subscriber Study* (1992) (App., Exh. J).

Finally, PEG programming speaks to a multitude of vital local issues. Government and educational channels may feature such programming as city council and school board meetings, local sports events, religious programming or a videotext community billboard. *Cable Television, supra*, at 59. Colleges use access channels not only to teach classes, but also to present more specialized studies, such as an examination of the immigrant experience through oral histories. Diana Agosta *et al.*, *The Participate Report: A Case Study of Public Access Cable Television in New York State* 45, 53 (1990) (App., Exh. K). Voluntary associations also use public access, including, for instance, the Humane Society in Fayetteville, Arkansas, which promoted its adopt-a-pet program, *Cable Access, supra*, at 13, and the Animal Rights Kinship of Austin, Texas, which produces the "ARK Forum" on animal and environmental rights, a program that promotes its low cost spay/neuter program, *id.* at 51. A musical

education series is sponsored by the Los Angeles Jazz Society. *Id.* at 39.

Moreover, PEG access channels are often the forum for core political debate. The Wrightwood Improvement Association of Chicago, for instance, used public access to marshal support for a "home equity" referendum. *Id.* at 30. In Tampa, Florida, public access cable provided the primary informational vehicle for citizens concerned about a county tax that was defeated in a record voter turnout. *Cable Television*, *supra*, at 59. "Also in Tampa, the educational cable access system's airing of school board meetings has resulted in vastly increased public contact with school board members." *Id.* at 59. In New York City, Paper Tiger television regularly produces programs that are sharply critical of the media. *Id.* at 60-61.

Austin, Texas, is home of one of access cable's oldest public affairs talk shows. *Cable Television*, *supra*, at 60. The League of Women Voters of Bucks County, Pennsylvania produces the ongoing video documentary series, "AT ISSUE." *Cable Access*, *supra*, at 57. Public access has also been host to viewpoints as diverse as those of leftist critics of the Gulf War (in Deep Dish TV's national series) and those of conservative Rep. Newt Gingrich (R-GA), who hosted half-hour shows produced by the Washington, DC-based American Citizen's Television (ACTV). *Cable Television*, *supra*, at 60-61.

Given the vital role that PEG has assumed, it is not surprising to find that its programming is at times controversial. For example, the Ku Klux Klan has circulated national programs for local viewing. George H. Shapiro, *Litigation Concerning Challenges to the Franchise Process, Programming and Access Channel Requirements, and Franchise Fees, in 1 Cable Television Law 1990: Revisiting the Cable Act* 341, § III, ¶ F., at 409 (Frank W. Lloyd ed. 1990). In the spirit of robust debate that is appropriate to an open electronic marketplace of ideas, the Klan programs spurred civil liberty and ethnic minority organizations to use the access service in response, which these groups have continued to do. Daniel L. Brenner, *supra*, § 604[7]. at 6-42.2 (1992).

Leased access has not to date been as successful as PEG. Cable operators have exercised their market power to price leased access out of the range of most programmers, as the Senate recognized in the legislative history of the 1992 Act:

> "The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls. To permit the operator to establish the leased access rate thus makes little sense." S. Rep. No. 92, 102d Cong., 1st Sess. 31 (1991).

Congress thus found that leased access was undermined by the system of operator-established rates that existed from 1984 until passage of the 1992 Act.

C. The 1992 Act. — During the period of federally mandated rate deregulation ushered in by the 1984 Act, the cable industry experienced tremendous growth. In the seven years following passage of the 1984 Act, cable penetration increased from thirty-seven to sixty-one percent of television households; monthly revenue increased from $18.94 to $31.51 per subscriber; and advertising revenue increased from $600 million to $3 billion. H.R. Rep. No. 628, *supra*, at 29.

Cable's growth spurred renewed congressional scrutiny of the industry. Since the beginning of October 1989, for example, the Senate Committee on Commerce, Science, and Transportation held eleven hearings on cable television. S. Rep. No. 92, *supra*, at 3. This oversight culminated in 1992 when Congress overrode a presidential veto and enacted the Cable Television Consumer Protection and Competition Act of 1992 ("the 1992 Act" or "the Act").

Neither of the bills that originated the 1992 Act contained any provision that even remotely resembles what is now Section 10.

Rather, both bills, as well as the hearings and committee reports on each of them, where predominantly concerned with issues related to rate re-regulation, local "must carry" rules, customer service practices, and industry integration and concentration. See S. Rep. No. 92, *supra*; H.R. Rep. No. 628, *supra*.

Portions of the original bills did evince a concern for leased access. Thus, what is now Section 9 of the Act strengthens leased access by introducing rate regulation for those channels, under which the Commission must establish maximum reasonable rates and reasonable terms and conditions for carriage. As the legislative history of this provision discloses, rate regulation is expected to "increas[e] certainty and the use of these channels." S. Rep. No. 92, *supra*, at 32. Similarly, by encouraging the use of leased access by "programming source[s] which devote[ ] substantially all of [their] programming to coverage of minority viewpoints, or to programming directed at members of minority groups," Section 9(c) of the 1992 Act further "assure[s] that the widest possible diversity of information sources are made available to the public," S. Rep. No. 92, *supra*, at 29 (citation omitted).

D. Pertinent Amendments in the 1992 Act. — After both houses held hearings and issued reports concerning the bills that were to become the 1992 Act, those bills were modified by two amendments directed at controlling the content of cablecasts that were sexually explicit or otherwise deemed to be objectionable. First, both the House and Senate bills were modified by what was to become Section 15 of the Act. 138 Cong. Rec. § 589 (daily ed. Jan. 29, 1992); *id.* at H6528-30 (daily ed. July 23, 1992). This provision is entitled "Notice to Cable Subscribers of Unsolicited Sexually Explicit Programs." It requires a cable operator to notify subscribers at least thirty days before they are provided any "premium channel" — defined as a pay service that offers movies rated by the Motion Picture Association of America ("MPAA") X, R or NC-17 — as part of a free promotion. The subscriber may then request that the operator block the transmission of this channel to his home, and the operator must comply.

The legislative history of Section 15 discloses that the provisions of this amendment were purposefully crafted to be

similar to the subscriber-initiated lockbox requirement of 47 U.S.C. § 544(d)(2)(A), which the viewer can use to block programs on pre-existing channels. As the Senate sponsor recognized, under Section 15, "[t]he subscriber must call the cable company and ask that the channel be blocked or that the cable company provide a lockout device." 138 Cong. Rec. § 589 (daily ed. Jan. 29, 1992) (statement of Sen. Helms).[3]

The second such amendment was Section 10. In contrast to Section 15, Section 10 did not arise as an amendment in both houses of Congress. Rather, it was offered in three different parts as floor amendments on the last legislative day before the Senate approved its bill. Senator Helms first proposed subsections (a) and (b) with regard to leased access, *Id.* at § 646 (daily ed. Jan. 30, 1992). Senator Fowler immediately added subsection (c) for PEG. *Id.* at § 649. Some time later, Senator Helms added subsection (d) which abrogates statutory immunity for cable operators if they are found to have carried on PEG or leased access any program that "involves obscene material." *Id.* at S652. No provisions similar to any of Section 10's four subsections were introduced in the House.

Also in contrast to Section 15, Section 10's provisions are not even remotely analogous to lockboxes or any other system of subscriber-initiated blocking. Rather than relying on subscriber-initiated blocking, Section 10 allows an operator to prohibit even protected speech, without regard to whether subscribers want to see it or not. It therefore differs from a system of subscriber-initiated blocking, which allows parents to decide what (if any) programming to screen from their children.

For leased access, Section 10(a) allows cable operators to prohibit programming that the operator "reasonably believes" is

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[3] We note that Section 15's system of subscriber-initiated blocking is problematic for a reason unrelated to the concerns of these Comments. Because the MPAA rating system does not provide the safeguards required by the first amendment, *Motion Picture Ass'n.*, v. *Specter*, 315 F. Supp. 824, 825 (E.D. Pa. 1970), government regulations may not rely upon it, *Swope* v. *Lubbers*, 560 F. Supp. 1328, 1334 (W.D. Mich. 1983).

indecent. If the operator does not prohibit such programming on leased access channels, the operator is required by Section 10(b) to place all indecent programs (as defined by the Commission and self-identified by the programmer) on a single channel and to block that channel unless a subscriber requests access in writing. The Commission is required to promulgate leased access regulations within 120 days.

For PEG access, Section 10 follows a different approach. Section 10(c) requires the Commission to promulgate regulations within 180 days that will enable a cable operator to prohibit not just sexually explicit programming, but also "material soliciting or promoting unlawful conduct."

In the case of both PEG and leased access, Section 10(d) abrogates a statutory immunity and allows a cable programmer to be held liable if it carries any program that "involves obscene material." Liability may be imposed whether or not the operator has exercised the authority to prohibit programming given to it under subsections (a) and (c).

In sum, although Section 10 treats PEG and leased access differently, for both types of channels it allows an outright ban on purportedly offensive programming. Rather than directly instituting these bans, however, Section 10 follows a bifurcated approach. First, subsections (a) and (c) allow cable operators to ban the disfavored programming. Second, subsection (d) waives the statutory immunity otherwise available to those operators if they fail to ban programming that "involves obscene material."

Section 10 and its legislative history are remarkably void of any reference to the lockbox requirement of the 1984 Act, now codified at 47 U.S.C. § 544(d)(2)(4). The congressional record thus contains no legislative findings to support a conclusion that lockboxes have somehow become ineffective in achieving the interest of protecting minors. Rather, the portions of the bill that were enacted as Section 10 were introduced on the floor of the Senate without a committee report on their purpose, justification or likely effect. Even then, no Senator so much as purported to present a considered judgment with respect to how often or to what

extent minors were being exposed to cablecasts that their parents considered unsuitable, despite the lockbox requirement.

E. The Commission's Proposed Rule. — On November 5, 1992, the Commission instituted the instant docket in order to promulgate a rule under Section 10. Appendix A of its Notice of Proposed Rule Making presents the Commission's Proposed Rule, which is intended to implement Section 10. In large measure, the commission's proposed Rule merely reiterates the provisions of Section 10's first three subsections, but it omits any construction of subsection (d)'s imposition of liability.

The Commission's Proposed Rule is accompanied by a prefatory Notice that generally solicits suggestions for regulations not contained in the Proposed Rule. For example, with respect to the content-based regulation of PEG, it requests commenters to address "whether our regulations should provide for any additional matters not expressly addressed in the statute," and it "invite[s] interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision." Notice ¶ 14, at 7. See also *id.* ¶ 12, at 6 (similar language with respect to leased access). It also speaks in general terms about other possible regulations that are not a part of the Proposed Rule.

In contrast to the congressional record, the Commission's Notice does recognize that lockboxes remain an effective means to "control access to other cable services on the system or to limit access to [an unblocked leased access channel] to others in the household." Notice ¶ 9, at 5. It is nonetheless similar to the congressional record in that it, too, is void of either evidence or reason to support a conclusion that lockboxes have somehow become ineffective in achieving the interest of protecting minors from programming that their parents consider unsuitable for children.

SUMMARY

Because the first amendment commands that "Congress shall make no law . . . abridging the freedom of speech," the federal courts have held that the power to regulate "must be so exercised

as not, in attaining a permissible end, unduly to infringe on the protected freedom." *Cantwell* v. *Connecticut*, 310 U.S. 296, 304 (1940). Section 10 and the Commission's Proposed Rule violates this basic tenet, as we discuss in detail below.

As an initial matter, Section 10 does not escape first amendment scrutiny merely because the programming standards contained in subsections (a) and (c) are expressed in permissive terms. State action is implicated because this federal legislation impinges on locally-created PEG and leased access public fora. The leased access blocking requirements of subsection (b) also demonstrates direct state action. Additionally, the threat of liability contained in subsection (d) exercises coercive government power over the operator, thereby "convert[ing] its otherwise private conduct into state action." *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987), *cert. denied*, 485 U.S. 1029 (1988).

Even if the prohibitions allowed by Section 10 were not considered state action, they would still be subject to the first amendment, for they impinge on a public forum. Local franchising authorities have, with Congress's approval, "intentionally open[ed] a nontraditional forum for public discourse" and created a public forum for "the free exchange of ideas." *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 112 S. Ct. 2701, 2706 (1992). Even private restrictions on access channels are therefore subject to first amendment scrutiny.[4]

Under appropriate first amendment analysis, Section 10 is itself unconstitutional, for it fails the least restrictive means test. Federal law already requires cable operators to make lockboxes available, 47 U.S.C. § 544(d)(2)(A), and these have been recognized by the courts and the Commission as an effective and non-intrusive means of controlling the access of unsupervised children to programming

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[4] *Missouri Knights of the Ku Klux Klan* v. *Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989).

that their parents find inappropriate.[5] Content-based restrictions are therefore unconstitutional.[6]

By largely reiterating the statute, the Commission has failed to propose constitutional regulations under Section 10. First, the Commission's Notice of Proposed Rulemaking is completely devoid of any consideration of less restrictive means. The ban it envisions on all sexually explicit and otherwise assertedly objectionable programming impermissibly reduces adults to viewing only those access programs that are suitable for a child. For that reason, such bans have always failed, even when advanced as a scheme to protect minors from television broadcasts.[7] Moreover, even if such a ban could be justified, it is unnecessarily restrictive in the case of cable. The Commission has often determined that the far less restrictive option of lockboxes sufficiently guards children from sexually explicit programming, and it has been supported in this determination by Congress and the courts. However, the Notice fails to offer a reason for the Commission's change in position, and no facts are presented on the record to support that change.

Second, because it is woefully underinclusive, the Proposed Rule cannot be justified as necessary to serve a compelling state interest. It mirrors the statute's concern for programming only on PEG and leased access channels, without preventing other sexually explicit or otherwise objectionable cablecasts from reaching the unsupervised children who are assertedly being protected. This is especially suspect because Congress has recognized the existence of other forms of sexually explicit cablecasts, but it has not given the

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[5] *ACLU* v. *FCC*, 823 F.2d 1554, 1579 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988); FCC 87-306, 2 F.C.C.R. 5893, ¶ 9, at 5894 (1987).

[6] See, *e.g.*, *Cruz* v. *Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985); *Community Television* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

[7] *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, *and cert. denied*, 112 S. Ct. 1282 (1992). See generally *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

Commission the power to impose similar restrictions on them. In the end, therefore, the Commission is constrained from effectively implementing the goal that purports to justify a content-based restriction on speech. Instead, its Proposed Rule burdens only those who speak on PEG and leased access channels — society's less powerful interests, including minorities, who otherwise have no access to the electronic media.

Third, even as a child protection measure, the standard for prohibiting PEG programming suffers from overbreadth. It is not limited to the "patently offensive" sexual material that constitutes indecency, and it prohibits "material soliciting or promoting unlawful conduct." The Commission itself has indicated that this standard must be narrowed, *see* Notice at 6 n.11, but it has not done so in the Proposed Rule, *see id.* App. A. In the same vein, the immunity waiver provision of Section 10(d) is overbroad because it subjects cable operators to liability for carrying not only obscene programs, but also those that "involve[ ]" obscenity. The Commission has similarly failed to use its interpretive powers to narrow this vague statutory provision.

Finally, the Commission has not proposed appropriate procedures for the prior imposition of these content-based restrictions on speech. Although not always invalid *per se*, content-based prior restraints must be accompanied by a highly protective system of judicial safeguards. Because the provision for imposing liability on cable operators is vague, it, too, should only be imposed after a court has previously found a program obscene. Such procedures are totally absent from the Proposed Rule, however.

The Commission has not exercised its interpretive power to narrowly construe Section 10 to avoid these constitutional deficiencies. Rather, it has at best indicated that such steps would be appropriate without incorporating corresponding regulatory language into the Proposed Rule. See, *e.g.*, Notice at 6 n.11 (suggesting basis for narrowing statutory prohibition standard for PEG access). Indeed, the Commission has indicated that it intends to incorporate a host of other measures into its Proposed Rule, but it has not delineated the breadth of those measures. see, *e.g.*, *id.* ¶ 14, at 7 ("Commenters should also address whether our

regulations should provide for any additional measures not expressly addressed in the statute."). In any circumstance, this rulemaking approach prejudices the public's right to comment on regulatory proposals. It should be especially disfavored in this situation, where core first amendment rights are threatened.

INTERESTS OF COMMENTERS

The Alliance for Community Media, the Alliance for Communications Democracy, the American Civil Liberties Union, and People for the American Way are non-profit corporations that represent organizations and individuals who use PEG and leased access channels both as programmers and as viewers. The comments that they jointly submit therefore reflect the unique shared perspective of organizations whose members have a direct interest in assuring that cable operators use the public rights of way in a manner consistent with the interests of the entire community.

The Alliance for Community Media (formerly the National Federation of Local Cable Programmers) is dedicated to both ensuring that people have access to cable and other electronic media and promoting community uses of such media. It is a national membership organization comprised of more than twelve-hundred organizations and individuals in more than seven-hundred communities, including volunteer access producers, access center managers and staff members, local cable advisory board members, city cable officials, cable company staff working in community programming, and others interested in local programming around the country. The Alliance for Community Media assists its members in all aspects of community programming over access channels, from production and operations to regulatory oversight.

The Alliance for Communications Democracy supports efforts to protect the rights of the public to speak via cable, and it promotes the availability of the widest possible diversity of information sources and services to the public. The Board of Directors of the organization is composed of representatives of

nonprofit access corporations in communities around the country,[8] who together have helped thousands of members of the public use the access channels that have been established in their communities.

The American Civil Liberties Union ("the ACLU") is a nationwide, nonpartisan organization with nearly 300,000 members, many of whom are viewers of PEG and leased access cable channels. It is dedicated to the protection and promotion of individual rights and liberties, primary among them freedom of speech. In 1990 the ACLU established an Arts Censorship Project specifically to combat an increased climate of censorship in the United States, including in particular efforts to suppress creative expression and information about sexuality and sexual orientation.

People for the American Way ("People For") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including first amendment freedoms. Founded in 1980 by a group of religious, civic and education leaders devoted to our nation's heritage of tolerance, pluralism and liberty, People For now has over 300,000 members nationwide. Many of People For's members subscribe to cable television and watch programs on PEG and leased access channels. People For's members have specific and personal interests in promoting the free flow of information and in receiving uncensored cable programming. People For seeks to protect the interests of its members, as well as the broader interest in preventing censorship of expression protected by the first amendment.

Although the commenters generally support the goal of protecting unsupervised children from cable programming that their parents find inappropriate, we cannot support the commission's Proposed Rule. The content-based restrictions that the Commission proposes will prove seriously disruptive to access programming and the value that it brings to local communities across the country.

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[8] These communities include Chicago, Illinois; Montgomery County, Maryland; Boston, Massachusetts; Grand Rapids, Michigan; Manhattan and Staten Island, New York; Columbus, Ohio; Tucson, Arizona; and the State of Hawaii.

Moreover, the Proposed Rule will work this mischief without adding anything to the already effective requirement that cable operators provide lockboxes to protect unsupervised children.

First, the PEG restriction on "material soliciting or promoting unlawful conduct" presents special problems for programming that engages in core political speech.[9] For example, in Grand Rapids, Michigan, the producers of "Lies of Our Times" have endorsed sanctuary for Latin American refugees and encouraged blockades of government offices in protest of various official positions. Similarly, "The Flying Focus Video Collective" of Portland, Oregon has hosted a speaker who advocated direct and illegal action to protect old timber growth. Several programs have advocated the decriminalization of marijuana, including "Libertarian Conspiracy" of Sacramento, California, "Libertarian Review" and "Time for Hemp" in Tucson, Arizona, and "Cannabis" in Kalamazoo, Michigan. Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech, and Free Expression*, 4-5 (Nov. 1992) [hereinafter *Public Access*] (App., Exh. L).

Second, the restriction on sexually explicit programming would curtail programming on health education and sex education, including programs that deal frankly with AIDS. This would include programming directed at both the gay minority and heterosexuals.

Examples of each of these types of programming are literally too extensive to document here. For example, Cambridge Community Television in Massachusetts could be faced with restrictions on a program entitled "Truth or Consequences: A Guide to Safe Sex at MIT." *Id.* at 4. So could Kalamazoo Community Access Center of Michigan for an AIDS prevention special that involved role-playing. *Id.* Similarly, the Northern Virginia Youth Services Coalition produces the weekly cable access series, "Focus

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[9] The description that follows is based in very large measure on *Public Access Cable Programming, Controversial Speech and Free Expression*, a draft article by Dr. Aufderheide, that is included in the Appendix as Exhibit L.

on Youth." In one program on AIDS, two professionals role-playing a dating situation were asked, "If you were dating, how would you get your partner to reveal his sexual history?" *Cable Access*, *supra*, at 49.

A video of a home birth in Amherst, Massachusetts might have fallen under scrutiny, as might have "Desperately Seeking Susan," a program in Olympia, Washington that is hosted by a therapist and includes frank discussion of sexual behavior and sexual dysfunctions. *Public Access*, *supra*, at 4. The same is true for the "HealthVisions" series, produced by the community and professional education department of Good Samaritan Hospital and Medical Center of Portland, Oregon. Programs in the series have included "PMS: Breaking the Cycle" and "Understanding Impotence: A Common and Treatable Problem." *Cable Access*, *supra*, at 37.

Moreover, some programs would face restrictions under either or both of the "unlawful" and "explicit" standards. For example, access centers in Forest Park Ohio, Fort Wayne, Indiana, Sacramento, California, Kalamazoo, Michigan, and Portland, Oregon have aired programs, some produced by Operation Rescue, that have opposed abortion. Some of these programs have either encouraged blocking access to abortion clinics or have contained possibly offensive explicit images, or both. *Public Access*, *supra*, at 5.

Finally, live programming, including call-in programs, will be particularly hindered by the commission's proposed Rule. These shows fulfill a unique role by both making cable immediately interactive and allowing disparate minority groups to communicate with each other through that medium. It is in the nature of these programs to be unpredictable, however, especially when they concern sensitive or hotly-debated topics. Because programmers of these types of shows cannot assure operators of their content, the fear of liability is especially likely to prompt their prohibition.

Several shows concerning sex education could thus be hampered. For example, one segment of "AIDS Call-in Live," from Chicago, included a seventeen-year-old girl asking how to respond to a boyfriend who assured her that they did not need to

use condoms because he was loyal to her. Speakers may also hold up items such as condoms to explain their use. *Id.* at 8.

Health education shows could also have the same problems, For example, "Health in America" is produced monthly in Sacramento and discusses alternative and holistic health-care options. It has included graphic images of women with mastectomies and damaged breast implants. *Id.* at 8.

Finally, topical call-in programs would also be threatened. Sacramento aired "Live Wire" within hours of the Rodney King verdict, on which callers had their volatile moments. And access programs in Oregon hotly debated that state's ballot initiative that would have criminalized some homosexual behavior. *Id.* at 5, 8.

No one can dispute the value of these programs to an adult viewing audience. Even if some parents feel that unsupervised minors should not be given free access to all of them, it ill serves society to reduce adults to viewing cable that is only fit for children. For that reason, we see lockboxes as the alternative that is superior to allowing the prohibition of this type of programming. Lockboxes allow adults both to control children's access and to partake of the robust speech and debate being aired on access channels. They also allow parents to decide for themselves whether or not their children will benefit from receiving information on sensitive topics, and they allow access to be granted for just the space of one program. Bans and blocking schemes offer none of these advantages, yet the congressional record and the Commission's Notice both disclose that hardly a whisper of attention has been paid to the lockbox option.

I. SECTION 10 VIOLATES THE FIRST AMENDMENT

There can be little doubt that the purpose and effect of Section 10 of the Act is to establish a system of censorship that violates the first amendment rights of those who wish to cablecast on PEG and leased access channels and those who wish to view the censored programming. As such, if the Commission is to implement this section of the Act *in haec verba* (as its Proposed Rule suggests), any final rule that it may promulgate in these proceedings will itself be unconstitutional. We discuss the various constitutional

difficulties that the Commission's Proposed Rule presents in the sections that follow this one.

This section focuses on the statute itself, and our purpose is twofold. First, we demonstrate the propriety of applying first amendment analysis to the content-based restrictions on free expression that are either enshrined in Section 10 or called for by it. Second, we show that Section 10's regulation of non-obscene cable programming is necessarily unconstitutional.

A. STATE ACTION

As an initial matter, we are aware of certain statements in the floor debates concerning Section 10 that attempt to categorize the restrictions on speech contained in that enactment as non-governmental and hence beyond constitutional scrutiny. *See, e.g.*, 138 Cong. Rec. § 646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms); *id.* at § 648 (statements of Sen. Thurmond); *id.* at § 649 (statement of Sen. Inouye). In our view, these statements are clearly mistaken.[10] As a general matter, Congress' role in establishing this system of censorship (as well as that of the Commission in implementing it) involves sufficient government action to implicate the protections of the first amendment. Access channels are public fora that have been created by localities through contracts between franchising authorities and cable operators. Pursuant to these contracts, local cable operators are prohibited from censoring access programming. Through Section 10, Congress seeks to interfere with these contracts by authorizing censorship through its chosen agents, the cable operators.

Moreover, two features of this regulation demonstrate the state's ongoing involvement in the system of censorship that Section

[10] Other floor statements clearly indicate that sponsors of Section 10 impermissibly intended "to forbid cable companies" from allowing programmers to freely express themselves over PEG and leased access channels. 138 Cong. Rec. § 646 (daily ed. Jan. 30, 1992)(statement of Sen. Helms), See also *id.* at § 652 (imposition of liability on cable operators "will put an end to the kind of things going on" access channels).

10 establishes. First, Congress has specified that, in all instances, leased access programming must be blocked if it constitutes "indecent programming, as defined by Commission regulations." Section 10(b) (codified at 47 U.S.C. § 532(j)(1)). This provision is an integral part of Section 10's system of censorship, and it indicates that Congress has fully involved itself and the Commission in placing restrictions on programming under the Act. As such it is direct state involvement that suffices to trigger first amendment scrutiny of the entire enactment.[11] Further, Section 10(b) indicates that Congress viewed the censorship of cable programming as a function of the state, and its delegation of a part of that power to a private actor does not insulate the exercise of that power from constitutional scrutiny. See, *e.g.*, *Williams* v. *City of St. Louis*, 783 F.2d 114, 117 (8th Cir. 1986) ("This delegation under state law of powers possessed by virtue of state law and traditionally exercised by the City satisfies us that the City's action here is under color of state law."); *Ancata* v. *Prison Health Servs. Inc.*, 769 F.2d 700, 703 (11th Cir. 1985) ("Where a function which is traditionally the exclusive prerogative of the state . . . is performed by a private entity, state action is present.").

Second, it is Congress in all instances that has specified what type of programming an operator may refuse to carry over PEG or leased access, otherwise mandating that "a cable operator shall not exercise any editorial control" over the programming of these channels. 47 U.S.C. § 531(e) (PEG); 47 U.S.C. § 532(c)(2) (leased access). This congressional specification of programming standards is not insulated from first amendment scrutiny merely because it is phrased in permissive terms, for it operates in tandem with Section 10(d)'s imposition of liability on private censors if they fail to prohibit speech that "involves" obscenity. In other words, these provisions place the operator in peril of liability and prompt it to

[11] Because "[t]he more relevant inquiry in evaluating severability is whether the statute will function in a *manner* consistent with the intent of Congress," *Alaska Airlines. Inc.* v. *Brock*, 480 U.S. 678, 685 (1987) (emphasis in original), the state action that adheres in the blocking provisions of subsection (b) cannot be severed from the rest of the statute.

restrict any programming that even remotely meets the permissive censorship standards set out in subsections (a) and (c) of Section 10, lest the speech also wander into the undefined grey area that "involves obscene material." *Cf. Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58, 67 (1963) (cautioning against elevating form over substance when determining whether censorship is occurring); *Penthouse Int'l. Ltd.* v. *McAuliffe*, 610 F.2d 1353, 1360 (5th Cir.) (same), *cert. dismissed*, 447 U.S. 931 (1980).

This effect has already been felt.[12] For example, as the Chairman and Chief Executive Officer of Time Warner Cable ("TWC") concluded in an affidavit that was submitted in litigation that brought a direct challenge to the 1992 Act:

> "The provision of Section 10(d) . . . injur[es] TWC by subjecting it to the risk of criminal and civil liability for programming created by others that it does not wish to carry but is required by law to carry. The provisions . . . of the Cable Act permitting TWC to prohibit or restrict obscene programming does not alleviate such injury in that they compel TWC to determine obscenity questions that even Federal courts regard as exceedingly difficult, and TWC remains exposed to criminal or civil liability if a court later disagrees with its determination." Affidavit of Joseph J. Collins, ¶ 37, at 23 (App., Exh. M).

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[12] Of course, the threat of liability is sufficient for state action purposes; it need not be the case, as here, that such a threat has proven to be the direct cause of private conduct, *Peterson* v. *City of Greenville*, 373 U.S. 244, 248 (1963) (finding state action "even assuming . . . that the manager would have acted as he did independently of the existence of the ordinance"); *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987) ("Simply by 'command[ing] a particular result,' the state had so involved itself that it could not claim the conduct had actually occurred as a result of private choice."), *cert. denied*, 485 U.S. 1029 (1988).

Cable operators thus feel compelled by their possible liability to censor widely.

Indeed, cable operators have for that reason already begun to institute censorship for programming that is sexually explicit but not even arguably indecent, out of fear that some such program might later be found to subject the operators to liability. As one cable operator wrote to the executive director of its local public access programmer,

> "all programming which contains sexual, excretory or other behavior or depictions, or language which potentially may be offensive to the citizens of Tucson [must] be sent to our system for screening *before* it is cablecast by TCCC over our cable system." Letter from InterMedia Partners to Tucson Community Cable Corp. (Nov. 13, 1992) (App., Exh. N).

Thus, not only is programming called in to question if it concerns sexual material of any nature, it is also subject to editorial scrutiny if it contains "potentially . . . offensive" language. Because of their unpredictable nature and potential to include such language, cable operators have specifically targeted live programming (including call-in shows):

> "Moreover, no live programming should be cablecast which contains such material. All such programming should be taped and sent to us for screening as outlined above." *Id.*

Recognizing the obvious dangers posed by the threat of government-imposed liability on private censors, federal courts faced with similar schemes have not hesitated to recognize the state action that brings first amendment principles to bear. For example, in *Carlin Communications, Inc.* v. *Mountain States Telephone & Telegraph Co.*, 827 F.2d 1291 (9th Cir. 1987). *cert. denied*, 485 U.S. 1029 (1988) Arizona's threat of criminal liability constituted sufficient state action to subject to first amendment scrutiny a telephone company's decision to bar sexually explicit messages. "With this threat, Arizona 'exercised coercive power' over Mountain Bell and thereby converted its otherwise private conduct into state action . . . ." *Id.* at 1295 (*quoting Blum* v. *Yaretsky*, 457

U.S. 991, 1004 (1982)).[13] Similarly, the threat of liability contained in Section 10(d) of the 1992 Act transforms the censorship standards of Sections 10(a) and (c), which are otherwise phrased in permissive terms, into state action.

Indeed, the existence of subsection (d) nullifies the state action arguments advanced in the floor debates on Section 10. Subsection (d) was not a part of the enactment then being debated, but was later added as a "conforming amendment." It is "conforming," however, only in the sense that it requires cable operators to conform to censorship standards that are otherwise phrased in permissive terms. In later proposing the addition of subsection (d), Senator Helms specifically stated that its purpose was to "put an end to the kind of things going on" access channels.[14] Given this change in circumstances, it is not surprising to find inapposite the federal cases cited in the floor debate for the proposition that the censorship being enacted would escape constitutional scrutiny. For example, Senator Helms pointed to *Carlin Communication. Inc.* v. *Southern Bell Telephone & Telegraph. Inc.*, 802 F.2d 1352 (11th Cir. 1986), to support his contention that "it is permissible to allow a private company to make *independent* decisions to exclude certain

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[13] The court went on to hold that any decision to ban speech made under threat of state-imposed liability "was unconstitutional state action" that violated the first amendment. 827 F.2d at 1296.

[14] In its Notice of Proposed Rulemaking, the Commission recognized the symbiotic relationship between the programming standards of subsections (a) and (c) and the imposition of liability contained in subsection (d). For example, Paragraph 13 first notes that subsection (c) "merely allows the cable operator the option" of censoring PEG. The next sentence immediately juxtaposes

"As pointed out earlier, however, [subsection (d)] expressly provides that cable operators are no longer statutorily immune from liability for carriage of obscene materials on these channels."

However, we note that the legislative history of subsection (d) suggests that liability cannot be imposed on cable operators with respect to PEG. The scant floor debate was concerned wholly with leased access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

objectionable material." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (emphasis added). As others have readily recognized, however, the threat of liability removes the independence of that decision and renders it subject to first amendment scrutiny. See, *e.g.*, *Mountain States*, 827 F.2d at 1295; *id.* at 1298 n.2 (Canby, J., dissenting in part) ("the presence of this coercion differentiates this case from *Carlin* v. *Southern Bell*").

B. PUBLIC FORUM

Even were the censorial dictates of Section 10 not themselves state action, the first amendment would still apply. Because PEG and leased access constitute a quintessential public forum, a system of censorship is not insulated from the first amendment simply because Congress has vested private cable operators with the decision to prohibit speech in that forum. When the government destroys a public forum by empowering private actors to restrict speech, it must do so within the bounds of the first amendment.

PEG and leased access certainly constitute such a public forum — one that is unique because of the widespread reliance on electronic communication. Congress recognized this status in the legislative history of the 1984 Act, which both recognized that local franchising authorities could provide for PEG in franchises and required them to establish leased access, See H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4667 (quoted *supra* page 4). The legislative history of the 1992 Act similarly recognizes that Congress has heretofore "requir[ed] cable operators to operate public and leased access channels as a public forum open to any and all speakers." 138 Cong. Rec. S648 (daily ed. Jan. 30, 1992) (letter from Mr. Peters); *id.* at S652 (statement of Sen. Helms) ("[T]he intent of the [1984] law, obviously, was to promote diversity in cable programming. The law required cable operators to carry anything that programmers brought along."). In sum, "the underlying theory of leased access channels [is] to provide a forum for people to speak out on a diversity of issues." *Id.* (statement of Sen. Thurmond). See also S. Rep. No. 381, 101st Cong., 2d Sess. 46 (1990) (PEG and leased access constitute "a free market of ideas").

Under generally applicable first amendment principles, therefore, localities that implement these provisions pursuant to their franchising authority have purposefully "'open[ed] a nontraditional forum for public discourse'" and created a public forum "that has as 'a principal purpose . . . the free exchange of ideas.'" *International Society for Krishna Consciousness, Inc.* v. *Lee* 112 S. Ct. 2701, 2706 (1992) (quoting *Cornelius* v. NAACP *Legal Defense & Educ. Fund. Inc.*, 473 U.S. 788, 800, 802 (1985))[15]. The federal courts have thus recognized that PEG and leased access constitutes a public forum for purposes of first amendment analysis.[16]

Because of the recognition that access channels are a public-forum, as at least one commentator has noted, "for the access channels, the 1984 Act regards the cable system as the modern counterpart to the city street or, perhaps more precisely, to the streets in a company town." Michael I. Meyerson, *The Cable Communications Policy Act of 1984: A Balancing Act on the Coaxial Wires*, 19 Ga. L. Rev. 543, 585 (1985). Attempts by

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[15] See also *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 555 (1975) (finding municipal auditorium a public forum); *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 570 (9th Cir. 1984) (same for amphitheater), *cert. denied*, 471 U.S. 1054 (1985); *Yurkew* v. *Sinclair*, 495 F. Supp. 1248, 1252 n.5 (D. Minn. 1980) (state fair grounds); *United States Labor Party* v. *Knox*, 430 F. Supp. 1359, 1361-62 (D.N.C. 1977) (parking areas adjoining state-owned liquor stores).

[16] See, *eg.*, *Quincy Cable TV. Inc. v. FCC*, 768 F.2d 1434, 1452 (D.C. Cir. 1985) ("access rules . . . serve countervailing First Amendment values by providing a forum for [the] public"), *cert. denied*, 476 U.S. 1169 (1986); *Muir v. Alabama Educ. Television Comm'n*, 656 F.2d 1012, 1022 & n.19 (5th Cir. Unit B 1981); *Erie Telecommunications, Inc. v. City of Erie*, 659 F. Supp. 580, 598-600 (W.D. Pa. 1987) ("access requirements are intended to make cable channels available to the public on a first-come, first-served nondiscriminatory basis"). See also *Berkshire Cablevision of Rhode Island, Inc. v. Burke*, 571 F. Supp. 976, 987 (D.R.I. 1983) (access rules "mandate that all individuals be given the opportunity to appear on cable television on a nondiscriminatory first-come, first-served basis"), *vacated as moot*, 773 F.2d 382 (1st Cir. 1985).

private operators to now forbid expression upon channels that have previously been dedicated as a public forum are therefore subject to first amendment analysis, just as first amendment scrutiny is necessary when the private owner of a company town attempts to deny others the right to speak on nominally private sidewalks. *Marsh* v. *Alabama*, 326 U.S. 501, 507-08 (1946). "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Id.* at 506. *Cf. International Society for Krishna Consciousness* v. *State Fair of Tex.*, 461 F. Supp. 719 (N.D. Tex. 1978) (enjoining restrictions placed by non-profit corporation on religious expression being pursued in a public forum).

In a situation remarkably similar to that presented by Section 10, it vas an access channel's status as a public forum that prompted a federal court to apply first amendment analysis to a scheme of permissive private censorship. *Missouri Knights of the Ku Klux Klan* v. *Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. No. 1989). The *Kansas City* case arose after members of a racist organization declared their intention to air a program over a public access channel. In reaction, the city council passed an ordinance that "permitted [the local cable operator] to delete the cable channel if it so desired." *Id.* at 1350. In its stead, "a new channel would be created" that "would be subject to [the operator's] editorial control." *Id.* Recognizing that the introduction of permissive editorial control would have intruded upon a public forum, the court denied a motion for summary judgment that would have eliminated a first amendment claim. It held that "[a] state may only eliminate a designated public forum if it does so in a manner consistent with the First Amendment." *Id.* at 1352.[17] Because

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[17] See also *United States* v. *Grace*, 461 U.S. 171, 180 (1983) ("the destruction of public forum status. . . is at least presumptively impermissible" under the first amendment). *Cf. United States Postal Serv.* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981) ("Congress, no more than a suburban township, may not by its own *ipse*

(continued...)

Section 10 and the Commission's proposed regulations thereunder would similarly allow cable operators to impinge upon the PEG and leased access public forum, they are proper objects of scrutiny under the first amendment.

C. FIRST AMENDMENT VIOLATIONS

We have shown above that Section 10 does not escape first amendment scrutiny. Moreover, under standards applicable to content-based cable regulations, Section 10 is unconstitutional. As the Commission has recognized in this docket, see Notice ¶ 7, at 4, differences in the characteristics of the various print and electronic media mandate different standards of first amendment protection against content-based regulation of expression pursued over each such medium. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 386 (1969). "Each method of communicating ideas is a 'law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 501 (1981) (quoting *Kovacs* v. *Cooper*, 336 U.S. 77, 97 (1949)). Attention to the peculiarities of each medium is therefore necessary when it comes to scrutinizing attempted government regulation of speech that, while not obscene, may be sexually explicit.[18]

Thus, while the legislative history of Section 10 discloses an intent to import content-based regulations that may be appropriate for other media into cable, see, *e.g.*, 138 Cong. Rec. S646-47 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (referring to

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[17](...continued)
dixit destroy the 'public forum' status of streets and parks which have historically been public forums.").

[18] Compare *FCC* v. *Pacifica Found.*, 438 U.S. 726, 748 (1978) (concerning indecency standards applicable to broadcast) with *Sable Communications* v. *FCC*, 492 U.S. 115, 127 (1989) ("[t]he private commercial telephone communications at issue here are substantially different from the public radio broadcast at issue in *Pacifica*") and *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (distinguishing receipt of sexually explicit mail from broadcast).

restrictions on telephone communications), such importation does not satisfy the first amendment. Rather, because the unique features of cable have allowed Congress to require that operators make lockboxes available, federal courts have found that federal law already mandates the least restrictive means available to effectively curbing the exposure of unsupervised children to sexually explicit, non-obscene cable programming. For that reason, Section 10's content-based restrictions violate the first amendment.

First, unlike broadcast, cable does not involve a "captive audience" — precisely the basis on which the Supreme Court in *Sable Communications* v. *FCC*, 492 U.S. 1150, 127-28 (1989), distinguished the telephone communications it was concerned with from the broadcast at issue in *Pacifica*. It was also on this basis that federal courts have stricken local cable regulations that, like Section 10, seek to limit sexually explicit programming. Thus, in *Community Television* v. *Roy City*, 555 F. Supp. 1164 (D. Utah 1982), the court invalidated a local ordinance that sought to regulate indecent cable programming, reasoning that all cable viewers must subscribe to the service and retain the power to cancel that subscription. The court held that cable subscribers must specifically choose to invite cable programming into their home, and it therefore found inapplicable the captive audience rationale that supports the regulation of broadcast indecency. *Id.* at 1168-69. It was in part on the same basis that the Eleventh Circuit declared a similar ordinance unconstitutional, finding that "[a] Cablevision subscriber must make the affirmative decision to bring Cablevision into his home." *Cruz* v. *Ferre*, 755 F.2d 1415, 1419 (11th Cir. 1985). See also *Quincy Cable TV. Inc.* v. *FCC*, 768 F.2d 1434, 1448 n.31 (D.C. Cir, 1985) (citing *Cruz*), *cert. denied*, 476 U.S. 1169 (1986).

Second, cable presents technologies that provide subscribers even greater control over that service than they have over either broadcast or telephone. Cable is unique in offering subscribers the ability to lock out their children's receipt of specific channels that might otherwise be objectionable, just as parents may place the liquor cabinet under lock and key. Indeed, federal law mandates that all cable operators make available to their subscribers just such

lock boxes. 47 U.S.C. § 544(d)(2)(A). Thus, in finding unconstitutional a local restriction on sexually explicit programming, the Eleventh Circuit made special note of the "parental manageability of cable television" afforded by "the ability to protect children" through the use of a "'lockbox' or 'parental key'" available from Cablevision. *Cruz*, 755 F.2d at 1415, 1420. Set also *Quincy Cable TV*, 768 F.2d at 1448 n.31.

Because cable subscribers are not a captive audience and may use lockboxes to further control access to their service, additional restrictions on non-obscene cable programming are unnecessary and therefore violative of the basic first amendment principle that any restriction on speech must be narrowly tailored to achieving a compelling government interest. See *Carey* v. *Brown*, 447 U.S. 455, 461 (1980). See generally *infra* Section II. It was on this basis that the court in *Home Box Office, Inc.* v. *Wilkinson*, 531 F. Supp. 987 (D. Utah 1982), invalidated on first amendment grounds a Utah statute forbidding cable operators from knowingly distributing indecent programming, despite an asserted justification of the protection of minors. The court held that the regulation at issue would also have restricted the adult population to programming suitable for children. *Id.* at 997.

Because of the unique nature of cable television, we strongly agree with the federal courts that have struck down content-based regulations that were similar to the indecency restrictions contained in Section 10. Federal law already mandates the least restrictive means for effectively curbing the exposure of unsupervised children to sexually explicit cable programming. Section 10 therefore contemplates an unnecessary additional burden on the first amendment rights of PEG and leased access programmers and viewers, and any final rule that mirrors the statute would itself be unconstitutional.

Even if some content-based regulation could pass muster, however, it is clear that the one proposed by the Commission fails to meet constitutional minima. By parroting Section 10, the Proposed Rule incorporates all of the statute's constitutional infirmities. We now turn to an examination of the Commission's Proposed Rule.

II. THE COMMISSION HAS FAILED TO CONSIDER LESS RESTRICTIVE MEANS TO IMPLEMENT RESTRICTIONS CONTAINED IN ITS PROPOSED RULE

In order to comport with the first amendment, the content-based restrictions contained in the Commission's Proposed Rule must both further a governmental interest that is compelling and do so by the least restrictive means. *Sable Communications* v. *FCC*, 492 U.S. 115, 126 (1989); *Gibson* v. *Florida Bar*, 798 F.2d 1564, 1569 (11th Cir. 1986). *cert. dismissed*, 112 S. Ct. 633 (1991). The Commission has failed on both of these scores. It has not sufficiently articulated any underlying government interest in the restrictions it is proposing. Moreover, because it allows a total prohibition against both programming deemed to "promote" unlawful conduct (on PEG) and sexually explicit programming (on PEG and leased access), the Commission's Proposed Rule cannot be considered narrowly drawn to serve a compelling governmental purpose. *Carey* v. *Brown*, 447 U.S. 455, 461-62 (1980). Whatever the Commission's purpose, it clearly has no cognizable interest in keeping from adults either sexually explicit material or political programming that may take issue with existing law, which is of course the necessary implication of any total prohibition. Finally, because lockboxes already effectively implement the government's interest in protecting unsupervised children, even the introduction of censorship that is less than an outright ban would fail the least restrictive means test.

First, the Commission has failed to state on the record the compelling purpose that motivates the PEG restrictions contained in subsection (c) of its Proposed Rule. Such an articulation is of course a necessary predicate to determining "if it chooses the least restrictive means to further the articulated interest." *Sable*, 492 U.S. at 126. As for the leased access restrictions of subsection (a), the Commission mentions only in passing that it is concerned with "children's exposure to indecent programs" over those channels. Notice, ¶ 9, at 5. Even if that passing reference can be taken as a

full statement of the governmental interest being pursued,[19] the Commission has not developed any record evidence describing the nature and extent of that exposure. Without such a fact finding, any means implemented cannot be considered the least restrictive, because a reviewing court is left without a standard against which to judge the effectiveness of the various options. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167-68 (1962) (agency must make findings based on substantial evidence in order that court has something to review). See also *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1341-42 (D.C. Cir. 1988); *cf. Sable*, 492 U.S. at 126-27.

Second, no government interest can support the complete prohibition against sexually explicit programming on PEG and leased access, which the Proposed Rule allows. While the federal courts recognize that government may at times shield children from some sexually explicit material that is not obscene, that purpose must be served by the least restrictive means towards its effective implementation. *Sable*, 492 U.S. at 126. Schemes that use child protection as an excuse to keep such material away from both children and adults fall far short of this test. See, *e.g.*, *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957) (even when attempting to protect children, regulation cannot effectively reduce adults to having "only what is fit for children"). Regardless of the medium involved, therefore, child protection has failed as an excuse for total bans on sexually explicit material, including books, *id.*, telephone

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[19] We contend that it cannot be the requisite full statement. In the context of broadcast indecency, the court found that such an articulation came too late when it was not until oral argument that "the FCC's General Counsel, in response to the court's inquiry, clarified the government's interest: it is the interest in protecting unsupervised children from exposure to indecent material; the government does not propose to act *in loco parentis* to deny children's access *contrary* to parents' wishes." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1343 (D.C. Cir. 1988) (emphasis in original). In any event, if the same as yet unarticulated interest motivates the Commission's programming restrictions for cablecast, lockboxes present the superior means of empowering parents to supervise their children however they so choose, as we discuss below.

messages, *Sable*, 492 U.S. at 127-31, unsolicited mail, *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60 (1983), and radio and television broadcasts, *Action for Children's Television* v. *FCC*, 932 F.2d 1504, 1508-09 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281, *and cert. denied*, 112 S. Ct. 1282 (1992). It is thus not surprising to find that the protection of children has failed as an excuse for previous attempts to prohibit sexually explicit programming from being carried on cable. See *Cruz* v. *Ferre*, 755 F.2d 1415, 1420-21 (11th Cir. 1985); *Home Box Office* v. *Wilkinson*, 531 F. Supp. 987, 997 (D. Utah 1982); *Community Television* v. *Roy City*, 555 F. Supp. 1164, 1166 & n.8 (D. Utah 1982).

Finally, the Commission's Proposed Rule would fail the least restrictive means test even if it did not allow operators to ban all sexually explicit or politically sensitive access programming. The Commission has simply failed to show a nexus between a proper governmental purpose and the introduction of editorial control by a cable operator whose incentives bias it against programmers not of their own choosing. See *supra* pages 2-4 and 9-10. This nexus is especially doubtful because the Proposed Rule does not prevent an operator from either acting arbitrarily, using criteria not narrowly-tailored to the government purpose, or carrying on other of its channels the same types of programming it may be prohibiting from PEG and leased access.[20]

In contrast to the approach adopted by the Commission's proposed rule, lockboxes present the least restrictive means of controlling the access of minors to programming that their parents

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[20] We also note that a least restrictive means requirement can be derived from the PEG and leased access statutes themselves. Even as amended, both state that "a cable operator shall not exercise any editorial control over" an access channel. 47 U.S.C. § 531(e) (PEG); 47 U.S.C. § 532(c)(2) (leased access). In order to keep the narrow amendments of Section 10 from swallowing this larger purpose — the preservation of a public forum — those amendments must be narrowly construed. By failing to propose safeguards such as those discussed in text, therefore, the Commission has also acted contrary to the statute.

find inappropriate, as we show below.[21] Moreover, cable operators are already required to make lockboxes available to all subscribers. 47 U.S.C. § 544(d)(2)(A). Without a finding that lockboxes are ineffective, therefore, the introduction of outside editorial control over PEG and leased access programming must be considered an unconstitutionally intrusive means of protecting unsupervised children from sexually explicit programming.

The Commission in the current docket has acknowledged that lockboxes play a role in limiting children's access to cablecast indecency. Notice ¶ 9. at 5 (lockboxes are available to subscribers to "control access to . . . cable services on the system [and] to limit access to [channels carrying indecency] to others in the household"). In other dockets, too, the Commission has spoken directly to the effectiveness of this technique. See, *e.g.*, FCC 85-179, 1985 FCC Lexis 3475, ¶ 132, at 112-13 (Apr. 11, 1985) ("Indeed, we believe that the provision for lockboxes largely disposes of issues involving the Commission's standards for indecency, and would also be a significant factor in cases related to obscenity and similar offensive programming.") (footnote omitted). Thus, when discussing techniques for reducing children's exposure to broadcast indecency, the Commission specifically noted that:

> "Technical means are available to block children's access to indecent cable programs . . . . Upon request, cable operators must provide a device such as a 'lock-box' or 'parental key' that permits a subscriber to restrict access to selected programming . . . . [Lockboxes] can restrict access by children whether or not parents are physically present and actively supervise." FCC 90-264, 5 F.C.C.R. 5297, 5305 (1990).

The Commission has not been alone in recognizing the effectiveness of lockboxes. Congress, too, has recognized both that lockboxes effectively screen indecency and that they do so without infringing on the first amendment rights of programmers and adult viewers. See H.R. No. 934, 98th Cong., 2d Sess. 70 (1984), 1984

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[21] Examples of several lockbox owner manuals are presented in the Appendix as Exhibit O-Q.

U.S.C.C.A.N. at 4655, 4707 (quoted *supra* at 5). And the federal courts have similarly acknowledged that these devices are effective for protecting children without burdening programmers' rights to speak. See cases cited *supra* Section I.C. Indeed, lockboxes are considered superior to central blocking because they place "responsibility for making such choices . . . where our society has traditionally placed it — on the shoulders of the parent." *Fabulous Assocs. Inc.* v. *Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 788 (3d Cir. 1990). See also *Bolger*, 463 U.S. at 73-74 (parental discretion controlling access to unsolicited contraceptive advertising is the preferred method of dealing with such material).

In the face of this precedent, the Commission has simply failed to explain in any manner either why lockboxes are now no longer effective or why a more burdensome means of protecting children has become necessary.[22] Without record evidence that supports a well-reasoned determination that lockboxes are ineffective, the more restrictive option of central blocking cannot be implemented. *Cf. ACLU* v. *FCC*, 823 F.2d 1554, 1579 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

III. THE COMMISSION'S PROPOSED REGULATIONS ARE CONSTITUTIONALLY DEFICIENT BECAUSE THEY ARE UNDERINCLUSIVE

Because the constitution will tolerate a content-based restriction on speech only when it "is necessary to serve a compelling state interest and. . . is narrowly drawn to achieve that end," *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983), the failure of such a restriction to address the entirety of a problem "undermine[s] [the] claim that the prohibition . . . . can be justified by reference to the State's interest." *Carey* v. *Brown*, 447 U.S. 455, 465 (1980). Underinclusiveness thus stands as an

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[22] Nor has the Commission explored other alternatives that may be considered less restrictive than a ban or central blocking, such as a nighttime safe harbor. *Cf. Action for Children's Television*, 932 F.2d at 1509 (concerning Commission promulgation of nighttime safe harbor for broadcast).

important standard against which to judge content-based restrictions on speech. See *FCC* v. *League of Women Voters*, 468 U.S. 364, 396-98 (1984) (underinclusiveness as basis for striking down ban on editorializing on only noncommercial stations receiving public funds); *Community-Service Broadcasting* v. *FCC*, 593 F.2d 1102, 1122 (D.C. Cir. 1978) (en banc) (underinclusiveness as basis for striking down requirement that only noncommercial educational broadcast stations retain audio recordings of broadcasts).

Taken as a whole, the Commission's Proposed Rule is unconstitutionally underinclusive and thus cannot be considered to further a compelling goal. This underinclusiveness results from the Commission's decision to parrot Section 10 in its Proposed Rule. Although one Senate sponsor purported to be concerned with "forbid[ding] cable companies from inflicting their unsuspecting subscribers with sexually explicit programs," 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms), Section 10 is targeted only at PEG and leased access channels. Congress therefore granted the Commission the power to regulate through prohibitions and blocking only a small part of what it regarded as a larger problem. Because the larger problem is not addressed, however, the goal of the statute can hardly be considered compelling.

In largely reiterating Section 10, the Commission's Proposed Rule mirrors this constitutional defect and further demonstrates the lack of any compelling state interest. The only governmental interest that the Commission has mentioned with respect to its Proposed Rule is that "children's exposure to indecent programs is effectively eliminated." Notice ¶ 9, at 5. In line with its limited authority under Section 10, however, the Commission can only target access channels. It has no statutory authority to apply these strictures across the board, and, even if it did, to do so now without further notice and comment would violate the Administrative Procedures Act. See generally *infra* Section VI. Finally, an across the board restraint would self-evidently greatly magnify all of the other constitutional concerns outlined in these Comments.

Moreover, the Commission has failed to narrowly interpret the statute in a way that would provide for even-handed application —

i.e. to prevent operators from prohibiting from access channels the same types of programming it carries on other of its channels. Because the Proposed Rule omits such a safeguard, the Commission would allow a cable operator to cablecast sexually explicit programs over non-access channels while it prohibited the same type of programming on access channels.[23]

The underinclusiveness common to both the statute and the Proposed Rule is especially suspect because the legislative history of the Act demonstrates that Congress was aware that cable operators carry sexually explicit programming on channels other than leased access.[24] For example, floor statements evidence a concern that the Playboy Channel had been carried over a leased access channel in Puerto Rico. 138 Cong. Rec. S646, S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). While the Commission's proposed regulations might require that the Playboy Channel be scrambled on leased access, it places no similar restriction on its carriage over the other cable channels on which it far more typically appears.

Section 15 of the Act, which concerns unsolicited sexually explicit "premium channel" programs, also demonstrates that Congress was aware of sexually explicit nonaccess programming but did not find that prior blocking was necessary. Rather, Congress found that the problem was sufficiently resolved by allowing subscribers to request central blocking of the unsolicited premium channel — just as they can use lockboxes to block pre-

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[23] In *dicta*, the Supreme Court in *R.A.V.* v. *City of St. Paul, Minn.*, 112 S. Ct. 2538, 2545 (1992), stated that no fatal underinclusiveness is presented by "a State's prohibiting obscenity (and other forms of prescribable expression) only in certain media." Because the Commission's Proposed Rule differentiates between cablecasts over the same media, however, the Court's *dicta* in this regard is inapposite. Moreover, the Proposed Rule goes well beyond proscribable expression and intrudes upon constitutionally-protected speech.

[24] Nor has the Commission in this docket developed any facts on the record tending to show that access programming is somehow a greater problem.

existing channels (including access channels) if sexually explicit programming on these channels was unwelcome. See generally *supra* Section II (discussing lockboxes).

The narrow scope of Section 10 and the Commission's Proposed Rule is especially invidious in this context. The users of PEG and leased access channels have traditionally been those less powerful interests who otherwise have no access to the electronic media — a situation that is only reinforced by Section 9 of the Act, which specifically encourages the use of leased access by "programming source[s] which devote[ ] substantially all of [their] programming to coverage of minority viewpoints, or to programming directed at members of minority groups." Section 9(c) (codified at 47 U.S.C. § 532(i)). The Supreme Court's caution in *Cornelius*, v. *NAACP Legal Defense & Educ. Fund. Inc.*, 473 U.S. 788 (1985), is therefore particularly apt. When the "purported concern [is] to avoid controversy excited by particular groups," warned the Court, distinctions "may conceal a bias against the viewpoint advanced by the excluded speakers." *Id.* at 812. *Cf. R.A.V.* v. *City of St. Paul, Minn.*, 112 S. Ct. 2538, 2547 (1992) (banning some types of words but not others presents a "realistic possibility that official suppression of ideas is afoot").[25]

In sum, Section 10 and the Commission's Proposed Rule do not pursue a compelling state interest, and the Commission cannot overcome the statute's underinclusiveness by simply applying the scheme set out in Section 10 to all cable channels. Neither the 1992 Act nor the 1984 Act affords the Commission any such sweeping authority, which would be unconstitutional in any event.

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[25] *R.A.V.* too, is especially apt with respect to the Commission's standards for censoring PEG. In an apparent attempt to cover all programming that might in any way be considered inappropriate for children, that standard allows the censoring of both indecency and "material soliciting or promoting unlawful conduct." Because the Proposed Rule does not, however, proscribe all but the enumerated forms of allegedly inappropriate speech, it must be considered as an unconstitutional attempt to "regulate use based on hostility — or favoritism — towards the underlying message expressed." 112 S. Ct. at 2545.

However, the use of regulations concerning lockboxes — which *are* authorized by statute — to implement the constraints of Section 10 would permit the Commission to address Congress's concern for protecting unprotected children from cable programming their parents find inappropriate, and to do so on an evenhanded basis that applies to all cablecasts.

IV. THE STANDARDS FOR PROHIBITING SPEECH THAT ARE PROPOSED BY THE COMMISSION ARE OVERBROAD AND HENCE UNCONSTITUTIONAL

The Commission's Proposed Rule is overbroad in two different respects. First, the standard for prohibiting PEG programming intrudes upon protected speech. Second, the Commission has not given a narrowing construction to the liability standard contained in Section 10(d).

First, while the federal courts have occasionally suffered the regulation of speech when it is the only way to protect children, they have more generally recognized that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 212-13 (1975) (citations omitted). Far from being "narrow and well-defined," however, subsection (c) of the Commission's Proposed Rule covers "material soliciting or promoting unlawful conduct," a broad and vague expanse that renders the standard regarding PEG restrictions unconstitutionally overbroad. See *e.g.*, *Village of Shaumburg* v. *Citizens for a Better Env't*, 444 U.S. 620, 633-39 (1980); *Bigelow* v. *Virginia*, 421 U.S. 809, 815-18 (1975).

Generally, "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of. . . law violation," the only exception being inapplicable to the present situation — "where such advocacy is directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Hess* v. *Indiana*, 414 U.S. 105, 108 (1973) (quoting *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969)). See also *Noto* v. *United States*, 367 U.S. 290, 297-98 (1961) ("the mere abstract teaching . . . of the moral propriety or even moral necessity for a

resort to force and violence[ ] is not the same as preparing a group for violent action and steeling it to such action"). To preserve our political system's ability to change in the face of evolving notions of justice, the government cannot prevent the citizenry from advocating civil disobedience against unjust laws — *e.g.*, advocating for the underground railroad to fight slavery or advocating the refusal to sit at the back of the bus to fight segregation.

Similar problems are posed by the PEG restriction on "sexually explicit conduct." This standard omits provisions requiring either that the depiction be "patently offensive" or that it fail under a community standard. It thereby restricts far more speech that has ever been heretofore countenanced, even in protecting minors.[26]

The Commission recognizes the overbreadth of these provisions when it suggests in its Notice that these terms would have to be narrowed. ¶ 13, at 6 n.11. Subsection (c) of the Commission's Proposed Rule contains no such limiting construction, however, and it therefore remains overbroad. At the least, any final rate that the Commission may promulgate in this docket should explicitly narrow the PEG standard to obscenity, indecency as elsewhere defined, and soliciting prostitution.[27]

Second, the Commission has also failed to offer a limiting construction of Section 10(d), which extends liability to cable operators who carry programming that "involves obscene material." While it might be the case that liability could be imposed in the

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[26] Even were the Commission to limit "sexually explicit conduct" to indecency, we note that the indecency standard, too, raises serious first amendment concerns. See *Action for Children's Television* v. *FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

[27] An avowal by the Commission that they would adhere to any limiting construction not contained in the final rule itself is insufficient in this regard for two reasons. First, because section (d) of subsection 10 is a waiver of a liability immunity, others besides the Commission will be making liability determinations. Second, even if the determination were to be made by the Commission, its avowal does not have the binding force of a rule. *Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991).

proper circumstances — which would have to include procedural protections that are now absent (see *infra* Section V) — for carrying obscenity itself, in no case could it extend to carrying material that "involves" obscenity. Because the "involves" standard is an indefinite and nebulous term that fails to put cable operators on notice as to what programming may subject them to liability, Section 10(d) is unconstitutionally vague and overbroad. *Cf. Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 781 (C.D. Cal. 1991) (finding unconstitutionally vague a standard concerning material which in the judgment of the NEA may be considered obscene).

To survive first amendment scrutiny, a statute must be drafted with precision. See *Hobbs* v. *Thompson*, 448 F.2d 456, 460 (5th Cir. 1971) ("The overbreadth doctrine, therefore, focuses directly on the need for precision in legislative draftsmanship to avoid conflict with First Amendment rights."); *cf. Video Software Dealers Ass'n* v. *Webster*, 773 F. Supp. 1275, 1280 (W.D. Mo. 1991) (statute regulating protected speech must have purpose articulated with great precision; where purpose of statute not clearly articulated, statute stricken as overbroad), *aff'd*, 968 F.2d 684 (8th Cir. 1992). Thus, words such as "involving" and "tending," which foster indefiniteness, lead to imprecision and constitutional infirmity. For that reason, the Supreme Court in *Gooding* v. *Wilson*, 405 U.S. 518 (1972), found unconstitutional for vagueness and overbreadth a statute that outlawed speech "tending to a breach of the peace" because this standard was "'infinitely more doubtful and uncertain'" than "breach of the peace." *Id.* at 427 (citations omitted). See also *Gregory* v. *City of Chicago*, 394 U.S. 111, 119 (1969) (Black, J., concurring). Section 10(d)'s liability standard suffers from the same infirmity and, without a narrowing construct, cannot be considered constitutional. *Cf. Grayned* v. *City of Rockford*, 408 U.S. 104, 111 (1972) ("tends to disturb" imprecise when not construed narrowly).

V. THE COMMISSION HAS PROPOSED PROCEDURES FOR PROHIBITING SPEECH THAT ARE CONSTITUTIONALLY DEFICIENT

The Proposed Rule envisions denying programmers the ability to use PEG and leased access based on the sexually explicit or politically controversial nature of their message, thereby constituting a system of content-based prior restraints. See *Ward* v. *Rock Against Racism*, 491 U.S. 781, 795 n.5 (1989) (denial of the use of a forum prior to actual expression constitutes a prior restraint); *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 553 (1975) (same). "While [p]rior restraints are not unconstitutional *per se*. . . [a]ny system of prior restraint . . . comes . . . bearing a heavy presumption against its constitutional validity.'" *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 225 (1990) (quoting *Southeastern Promotions*, 420 U.S. at 558). See also *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 70 (1963).[28]

The federal courts have long held that to survive this strict constitutional scrutiny, prior restraints must, at a minimum, "take[ ] place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965). The Proposed Rule that the Commission has issued in this docket omits any such procedural protection. For that reason alone, it is unconstitutional.

With respect to only PEG, the Commission's Notice does ask for comments regarding procedures "to govern disputes between the cable operator and programmer," proposing that "any such disputes should be handled at the local level." ¶ 14, at 7. As an initial

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[28] As prior restraints, the proposed regulations stand in marked contrast to various "dial-a-porn" regulations that have been promulgated by the FCC and upheld by the Courts. Those regulations have no prior restraints because, rather than preventing the transmission of the sender's messages, they only hinder their receipt by minors. See *Dial Info. Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991), *cert. denied*, 112 S.Ct. 966 (1992); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 877-78 (9th Cir. 1991). It should be noted in this context that lockboxes, too, do not constitute prior restraints.

matter, even were this request to lead to some sort of dispute resolution mechanism, it would not extend to leased access programmers. Moreover, even if it did provide full coverage, no system of the type envisioned could provide sufficient protection for the constitutional rights that are at stake. An informal dispute resolution mechanism will not satisfy the first amendment's requirement for procedural safeguards.[29] Rather, such safeguards must include at least three elements:

> "*First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured." *Southeastern Promotions*, 420 U.S. at 560.

Because these elements are absent from informal dispute resolution, the notice does not request comment on a constitutionally sufficient system of procedural protections. Rather, the only constitutionally permissible system of dispute resolution would require operators to go to court for an adjudication that a specific program is obscene before that program may be kept off the cable system.

The Commission's Proposed Rule is also procedurally defective with regard to the standard by which a cable operator may be held liable for carrying "material involving obscenity." Liability for obscenity requires that the actor know the content of the material found obscene, *Smith* v. *California*, 361 U.S. 147, 152-54 (1959); *Video Software Dealers Ass'n* v. *Webster*, 968 F.2d 684, 690 (8th Cir. 1992) ("any statute that chills the exercise of First Amendment rights must contain a knowledge element"), but neither the statute nor the proposed Rule contains any such knowledge requirement.

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[29] Nor does the Commission propose procedures that will protect programmers from arbitrary decisions by operators, whose incentives are contrary to access channels. See *supra* pages 2-4 and 9-10. The Proposed Rule failed to include safeguards against delay, for example, or against invidious discrimination.

Given the present circumstances, the Commission should grant operators immunity from liability unless knowledge of obscenity is established through an operator's awareness that the implicated program had been determined to be obscene in a prior judicial determination in the same community. *Cf. Bella Lewitzky Dance Found.* v. *Frohnmayer*, 754 F. Supp. 774, 783 (C.D. Cal. 1991) (chilling effect of vague statute requires judicially administered procedural protections). This would more fully implement the policies behind the knowledge element, which is required in order to circumscribe the chilling effect that will flow from imposing liability from speech. Ordinarily, the knowledge requirement works in tandem with the requirement that the provision specify the prescribable speech with particularity. Here, because Section 10(d) reaches programming that "involves obscene material," that particularity is missing. By requiring that knowledge be established only by a prior judicial determination has declared a program obscene, the Commission will move towards restoring the proper first amendment balance.[30]

VI. THE COMMISSION'S INSUFFICIENT NOTICE OF ITS PROPOSED REGULATIONS PREJUDICES INTERESTED PARTIES' RIGHT TO COMMENT

We have already demonstrated that, in a number of different ways, the Commission has failed to act according to the precepts of administrative law. First, it has failed to articulate the purposes that will be served by its Proposed Rule. See *supra* page 43. Second, it has failed to present record evidence concerning the existence of whatever problem its Proposed Rule is intended to solve. See *supra* page 44. Third, it has failed to present its

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[30] The Commission recognizes this knowledge requirement when it proposes to waive Section 10(d) for operators who have not been informed by programmers that their programming is obscene. As a matter of logical consistency, the Commission should also state in its final rule that an operator is not enabled to prohibit a program pursuant to Sections 10(b) and 10(c) when it has not been informed by a prior judicial determination that the program is obscene.

reasoning as to the way that the Proposed rule would serve as a means of solving that problem. See *supra* pages 45-46.

An additional administrative law problem pervades this docket. Section 553(b)(3) of the Administrative Procedures Act (the "APA") requires an agency initiating a rulemaking to issue a notice that includes a complete description of either the terms of the proposed rule or the subjects and issues involved. 5 U.S.C. § 553(b)(3). The Commission has failed in this regard in several different respects.

With respect to PEG generally, the Notice is literally without standards. Paragraph 14 asks commenters to address "whether our regulations should provide for any additional matters not expressly addressed in the statute," and it "invite[s] interested persons to comment on these and any other aspects that they believe would be germane to proper implementation of this provision." This general request for comments fails to "describe the range of alternatives being considered with reasonable specificity." See *Small Refiner Lead Phase-Down Task Force* v. *EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) ("interested parties [do] not know what to comment on").

The Notice also fails to speak concretely about several specific PEG proposals. For example, Paragraph 14 also invites comment on whether the Commission should require "certifications by users or operators that no materials fitting into any of these statutory categories will be presented" on PEG. The Proposed Rule itself, however, makes no mention of such certification, despite the fact that it is clearly being contemplated by the Commission. It therefore runs afoul of the requirement of a detailed proposed rule, which "allows the parties to direct their comments toward concrete proposals, not amorphous subject areas. Such an approach is designed to generate a focused inquiry by both the agency and the parties." *National Tour Brokers Ass'n* v. *United States*, 591 F.2d 896, 901 (D.C. Cir. 1978).

Similarly, the Proposed Rule omits any formulation for the Commission's contemplated implementation of "specific procedures . . . to govern disputes between the cable operator and programmer of these [PEG] access channels." Notice ¶ 14. This again

prejudices the right of parties to direct their comments towards concrete proposals.

All of these errors are replicated in the notice with respect to leased access. For example, Paragraph 12 contains the same problematic general invitation asking commenters "to bring to our attention any other matters not discussed in this notice" and "seek[ing] comment on any other requirements that should be adopted in order to effectuate the new law's provisions." In Paragraph 11, the Commission seeks comment on whether cable operators "can require program providers to certify that their programming is not obscene or indecent," despite the fact that the Proposed Rule mentions nothing about the form, content or any other aspect of the proposed certification. Indeed, despite this absence, the Commission "assume[s]" that such certification is appropriate.

Similarly, Paragraph 9 requests comment on "blocking mechanisms and procedures relating to subscriber access," but none are contained in the Proposed Rule. And Paragraph 12 asks commenters to address two issues not the subject of the Proposed Rule itself: "whether a cable operator should be required to retain notifications for a prescribed period of time," and (ironically, given the absence of this proposal from the Proposed Rule), "whether a cable operator should be held harmless from liability under our *proposed rules* if it does not receive any, or timely, notification from a programmer" [emphasis added].

These deficiencies present three related administrative law problems. First, Section 553(b) requires an agency giving notice to "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible." *Home Box Office, Inc.* v. *FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977). See also *Florida Power & Light Co.* v. *United States*, 846 F.2d 765, 771 (D.C. Cir. 1988) (notice "must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully"), *cert. denied*, 490 U.S. 1045 (1989); *Connecticut Light & Power Co.* v. *NRC*, 673 F.2d 525, 530 (D.C. Cir.) ("If the notice of proposed rule-making fails to provide an accurate picture of the reasoning

that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."), *cert. denied*, 459 U.S. 835 (1982). The Commission's numerous omissions fall far short of this standard, however. The final rule will necessarily "deviate[ ] too sharply from the proposal, [and] affected parties will be deprived of notice and an opportunity to respond to the proposal." *Small Refiner*, 705 F.2d at 547.

Second, by avoiding the promulgation of concrete proposals, the Commission has also avoided going into detail as to its reasoning behind offering the suggested items. As the federal courts have instructed, "the notice required by the APA must disclose *in detail* the thinking that has animated the form of a proposed rule and the data upon which that rule is based." *Home Box Office*, 567 F.2d at 35 (emphasis added). Without this discipline, the quality of the final rulemaking suffer for want of the proposal being "tested by exposure to diverse public comment." *Small Refiner*, 705 F.2d at 547. See also *National Ass'n of Home Health Agencies* v. *Schweiker*, 690 F.2d 932, 949 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1205 (1983); *BASF Wyandotte Corp.* v. *Costle*, 598 F.2d 637, 641 (1st Cir. 1979). *cert. denied*, 444 U.S. 1096 (1980).

Third, without the agency's full reasoning and the exchange of views it engages from the public, a notice as insufficient as the Commission's compromises judicial review as well as. See *Home Box Office*, 567 F.2d at 35. Without precision concerning the contemplated agency action, commenters are deprived of their ability "to develop evidence in the record to support their objections," which further compromises judicial review. *Small Refiner*, 705 F.2d at 547.[31]

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[31] See also *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (an agency's consideration of comments, "no matter how careful," cannot cure the defect of inadequate notice); *AFL-CIO* v. *Donovan*, 757 F.2d 330, 340 (D.C. Cir. 1985) (proper notice cannot be attributed to parties on the assumption that they monitor the comments of others); *New Jersey* v. *EPA*, 626 F.2d 1038, 1049 (D.C. Cir. 1983)

(continued...)

We therefore urge that the Commission, in response to the instant comments and those submitted by other parties, issue a second proposed rulemaking and accept a second round of comments to allow for the full participation required by the APA We note in this regard that Section 10's statutory deadlines for the promulgation of rules presents no hurdle to the Commission. The federal courts have recognized that a statutory deadline must yield to the requirements of the APA when, as here, "Congress gave no explicit indication that it intended to override the procedural safeguards of the APA." *Sharon Steel Corp.* v. *EPA*, 597 F.2d 377, 380 (3d Cir. 1979). See also *New Jersey* v. *EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980); *United States Steel Corp.* v. *EPA*, 595 F.2d 207 (5th Cir, 1979).

CONCLUSION

Where a government has intentionally opened a forum for discourse, it cannot simply authorize restrictions on speech in that forum either directly or through a private party acting with its authority. Rather, any restriction on speech must be carefully tailored to balance the interests of government against those who wish to speak. If those restrictions are not narrowly drawn, the restrictions are unconstitutional.

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[31](...continued)
(permitting an agency to consider comments requested after publication of a final rule to substitute for proper notice would render the APA "virtually unenforceable"); *Small Refiner*, 705 F.2d at 549 (having failed to provide proper notice, an agency cannot "bootstrap" notice from a comment). Moreover, because proper notice is a prerequisite to proper rulemaking, a party's separate right to subsequently petition for amendment of a final rule does not obviate an agency's duty to provide proper notice of a proposed rule in the first place.

> "5 U.S.C. § 553(b) requires notice *before* rulemaking, not after. The right of interested persons to petition for the issuance, amendment, or repeal of a rule, is neither a substitute for nor an alternative to compliance with the mandatory notice requirements of § 553(b)." *National Tour Brokers, supra*, 591 F.2d at 902.

The Commission has failed to undertake the appropriate balancing in the instant docket. Instead, it has simply reiterated the provisions of Section 10. The result is a Proposed Rule infected by serious constitutional defects: a lack of articulated purpose, failure to examine the nexus between any such purpose and the chosen means, no attention to alternatives, and a failure to include safeguards. With its rulemaking in this posture, before the Commission issues a final rule, it should again accept public comments once it has presented on the record its reasoning with respect to these basic issues.

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CABLE TELEVISION AND THE PUBLIC INTEREST

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Public Access as a Public Space

Access programs often have been, in the words of one tired access director, "programmed to fail." This is less remarkable than the fact that they exist at all. Only canny, ceaseless, locality-by-locality citizen activism wrested access centers and channels in the franchise process in the first place (Engelman, 1990), and all such victories are temporary. The 1984 Act sabotaged some of those victories. It had capped localities' franchise fees and required them to be unrestricted. It did not require access channels. Points of confusion in the law — particularly the definition of "service" — as well as restrictions on renewal procedures, among others, made it easy for cable operators to pay more attention to their bottom line and for franchisers to pay more attention to road paving than to cable access. (Meyerson, 1990; U.S. Senate, 1990a, pp. 453-490; Ingraham, 1990; Brenner, Price, & Myerson, 1990, sec. 6.04[3][c], 6.04[4]).

Even under starvation conditions, access has carved out a significant role in the minority communities where it exists. Currently 16.5% of systems have public access; 12.9% have educational access, and 10.7% have governmental access (*Television and Cable Factbook*, 1990, p. C-384). An abundance of local programming is produced in some 2,000 centers — about 10,000 hours a week (Ingraham, 1990), far outstripping commercial production. The Hometown USA Video Festival, showcasing local origination and PEG channel production annually, in 1990 attracted 2,100 entries from 360 cities in 41 states.

These channels are often perceived to be valued community resources, using traditional measures. One multisite study shows that 47% of viewers watch community channels, a quarter of them at least three times in two weeks; 46% say it was "somewhat" to "very" important in deciding to subscribe to or remain with cable (Jamison, 1990). Another study, commissioned by Access Sacramento, showed that two-thirds of cable subscribers who knew about the channel watched it (Access Sacramento, 1991). Access centers provide resources and services typically valued at many times what they cost. Access Sacramento, for instance, estimates

a community value of its equipment, training, and consultation at $4.5 million, ten times its budget (Access Sacramento, 1990), an estimate corroborated by the experience of access cable in Nashville and Tucson.

But the most useful measure is not, and should not be, numbers of viewers or positive poll results, but the ability of access to make a difference in community life. Access cable should not function like American public television does. Public television offers a more substantial, thoughtful, challenging, or uplifting individual viewing experience than a commercial channel. Access needs to be a site for communication among and between members of the public as the public, about issues of public importance.

Beyond a basic technical level of quality, the entertainment value of such programming comes far secondary to its value as a piece of a larger civic project, whether it is citizen input into actions the local city council is making, or discussions of school reform, or a labor union's donation of services to low-income residents, or the viewpoints of physically challenged people on issues affecting them. This is because viewers are not watching it as individual consumers, but as citizens who are responding to a controversy. In each case, the program — unlike a commercial broadcast or cable service — is not the end point, but only a means towards the continuing process of building community ties.

In small and incremental ways, the access cable channel acts as a public space, strengthening the public sphere. In Tampa, Florida, for instance, public access cable provided the primary informational vehicle for citizens concerned abut a county tax that was inadequately justified. Major local media, whose directors shared the interests of politicians, had failed to raise accountability issues. The tax was defeated in a record voter turnout. Also in Tampa, the educational cable access system's airing of school board meetings has resulted in vastly increased public contact with school board members and a children's summer reading program in which libraries', schools', and the access center's work together has

resulted in the committee members, officers of 13 different institutions, finding other common interests.[1]

Access does not need to win popularity contests to play a useful role in the community. It is not surprising if people do not watch most of the time. (Indeed, given the treatment access gets by cable operators, it is a kind of miracle that viewers find the channel at all.) It is indicative of its peculiar function that people find the channel of unique value when they do use it. Different kinds of access are used for very different purposes. Government and educational channels may feature such programming as the city council meeting, the school board meeting, the local high school's basketball game, religious programming or rummage-sale announcements on a community billboard. Some colleges have sponsored oral history sessions that illuminate immigrant history (Agosta, Rogoff, & Norman, 1990; Nicholson, 1990).

Public access channels, run on a "first-come, first-served" basis, are responsible for much of access cable's negative image, and some of its most improbable successes. There is often a strong element of the personalist and quixotic in the programming. Public access channels are sometimes a source of scandal and legal controversy, as for instance when the Ku Klux Klan started circulating national programs for local viewing (Shapiro, 1990, pp. 409f; Brenner et al., 1990, sec. 604[7]). Less reported is that often the Klan programs spurred civil liberties and ethnic minorities organizations to use the access service for their own local needs, and these groups have continued to do so. Voluntary associations

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[1] Interviews with the following people between September 1990 and August 1991 informed the analysis of access cable: Andrew Blau, then communications-policy analyst, United Church of Christ Office of Communication, New York; Alan Bushong, executive director, Capital Community TV, Salem, OR; Gerry Field, executive director, Somerville Community Access Television, Somerville, MA; Ann Flynn, Tampa Educational Cable Consortium; Nicholas Miller, lawyer, Miller and Holbrooke, Washington, D.C.; Elliott Mitchell, ex-executive director, Nashville Community Access TV, TN; Randy Van Dalsen, Access Sacramento, CA.

— for instance, the Humane Society's adopt-a-pet program in Fayetteville, Arkansas — and a musical education series sponsored by the Los Angeles Jazz Society (Nicholson, 1990), also use public access. In some places — for instance, New York City, where Paper Tiger television regularly produces sharply critical programs on the media; or Austin, Texas, home of one of access cable's oldest talk shows — public access has become an established alternative voice in public affairs. Public access is host to viewpoints as diverse as those of leftist critics of the Gulf War (in Deep Dish TV's national series) and those of conservative Rep. Newt Gingrich (R-GA), who hosts half-hour shows produced by the Washington, DC-based American Citizens' Television (ACTV).

Thus access has a history of fulfilling a role of community service and has been recognized in law as performing a useful First Amendment function. Access cable could, in every locality, provide an unduplicated, local public forum for public issues.

Public Access under Assault

Since the 1984 act, however, access cable has been under relentless assault, both by cable companies and by cities under financial pressure to use nontargeted franchise fees (Ingraham, 1990). In municipalities such as Pittsburgh, Pennsylvania; Milwaukee, Wisconsin; and Portland, Oregon; cable companies immediately rescinded or renegotiated franchise terms regarding cable access, once the act went into effect.

Even when access was established or reestablished, the cost was significant. For instance, in Austin, Texas, the Time-owned company announced that it could not afford to meet its franchise obligations — especially its $400,000-a-year funds for access television and the provision of eight channels — only two weeks after deregulation went into effect. It took 11 months of civic organization and city council pressure, and some $800,000, to restore the provisions.

In localities beset with fiscal crisis — a widespread problem, since in the 1980s many costs of government were shifted downwards — revenues once designated to access have gone into general revenues. For instance, when Nashville found itself in a

budget crisis in 1988, a program by a gay and lesbian alliance on public access triggered a city council debate. The cable company, a Viacom operator, a supported city council members trying to rechannel access funds into general operating funds. The upshot was near-total defunding of the access center. In Eugene, Oregon; and Wyoming, Michigan; among others, municipalities have drastically cut or eliminated access budgets in favor of other city projects.

Cable policy in the public interest might well improve the dismal legal situation for access, as well as define clearly its role as a site where the public sphere can be strengthened. Policy could go further still, creating new mechanisms for use of the medium as an electronic public space. So far, legislative reform proposals have been virtually silent on access, much less on any as yet untested mechanisms to create new public spaces.

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THE AMERICAN UNIVERSITY

Washington, D.C.

PUBLIC ACCESS CABLE PROGRAMMING, CONTROVERSIAL SPEECH, AND FREE EXPRESSION

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Access cable—the channels variously known as public, educational and governmental (or PEG) and offered as part of basic cable wherever they have been called for in franchises — is that rare site on cable where public interest comes before profit (Aufderheide, 1992). Its past is embattled; it was created in uphill struggles by local community activists, and survived only where constantly defended — in perhaps 15 percent of cable systems nationwide. The Cable Communications Policy Act of 1984 (47 USC, 521-559), which dramatically reduced the power of local authorities to regulate through franchising and furthermore sapped access' funding mechanisms, weakened access' relationships with both local authorities and with cable companies.

Its present is no better. The Cable Television Consumer Protection and Competition Act of 1992 did nothing to repair earlier damage and, indeed, added language that may complicate access' function further. One provision of the Act in fact could challenge the fundamental purpose of public access and rob it of its unique function within cable television: to permit speakers open access to the community of viewers without censorship. That provision says, first, that a cable operator may prohibit on PEG channels "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." It also creates liability for cable operators in the case of obscene material (U.S. House of Representatives, 1992, 29).

Public access cable's free speech function is central to defining its social importance. Congress intended it to serve as "the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet" (U.S. House of Representatives, 1984, 21-22). Public access' mandate is thus linked to the implications of the first amendment; it is a public forum, a facilitator of public conversation.

Public access in protected in the 1984 act, which requires cable operators to carry it without interference, making speakers responsible for their own speech. The Act provides for viewer control over potentially offensive material by mandating lockboxes or channel blocking options. However, public access' first-come first-serve, open access principle is complicated in practice, not

least by the interest that local governments and cable companies have in the performance of these channels but also by practical questions of scheduling and handling demand on the service on the part of access managers (Meyerson, 1987-88, 189-91).

This study explores the social function of public access, as seen in programming that is or is seen as potentially controversial—the programming that could be in jeopardy with the 1992 Act. The study's objectives were to identify such programming and incidents of prohibiting such programming, and to estimate how editorial responsibility would alter the function and purpose of access, as perceived by access directors.

Some 31 access directors—chosen through their participation in the Alliance for Community Media, which represents the interests of cable access — were interviewed by telephone. Most (20) headed independent nonprofit entities; the rest were functionaries of local government (9) or the cable company (2). The majority (21) came from smaller communities, while 10 worked in major cities or state capitals. The sample was regionally diverse, with 13 from the East, seven from the Midwest, three from the South, and eight from the West. Roughly speaking, this diversity was typical of the population of the Alliance, and probably of access nationwide (although this phenomenon is dispersed and localized enough to lack dependable national statistics).[1]

The study was further bolstered by analysis of preliminary results of a mail survey asking the same questions, sent to access directors on the mailing list of the Alliance for Community Media. Among the 30 mail survey respondents, 21 headed nonprofit entities. Three centers were run by the city, and three by the cable company (two gave no information). Twenty-one were from smaller communities; nine were from major cities or state capitals. Thirteen came from the East, nine from the Midwest, one from the South, and seven from the West.[2]

PROGRAMMING THAT TESTS THE LIMITS

Access programming varies dramatically from locality to locality; what may be acceptable in Cambridge, MA is unimaginable in Defiance, OH or Olympia, WA. Access directors

typically believe that if production usually reflects a concern somewhere in that community. "If it has an audience," said director Deb Vinsel in Olympia, WA, "it's part of your community, even if you wish it were not."

Public access often provides a unique venue in electronic media for unpopular opinions, minority viewpoints or expressions of minority culture. Access directors, when asked to consider recorded programming that a cautious programmer might reject for fear of being interpreted as containing "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct," almost universally cited several examples. Those fell into several categories:

—sex education, particularly AIDS education. Series such as Fairfax (VA) Cable Access Corporation's *Gay Fairfax*, Grand Rapids (MI) Community Media Center's *The Lambda Report*, Tucson (AZ) Community Cable Corporation's *Empty Closet* would all be suspect for "sexually explicit conduct" related to AIDS education. So would be single programs such as Cambridge (MA) Community TV's *Truth or Consequences: A Guide to Safe Sex at MIT*, *AIDS*, a documentary cablecast at Spring Point Community television Center in South Portland, ME; and an AIDS prevention special involving role playing at Kalamazoo (MI) Community Access Center.

—health education. In Amherst (MA), a video of a home birth might have fallen under scrutiny. *Desperately Seeking Susan*, a program in Olympia, WA, hosted by a therapist, has featured delicate subjects, including one program on non-orgasmic women, with frank discussion of sexual behavior.

—opinions at the political margins, for potentially soliciting or promoting unlawful conduct. Libertarians, anarchists, rightists and leftists all variously use cable access to promote political opinion slighted by gatekeepers in mainstream media. As well, passionate believers in particular political issues, such as abortion or homosexual rights, look to this venue.

For instance, in Grand Rapids producers of a regular series *Lies of Our Times* have at times endorsed sanctuary for Latin American

refugees and encouraged blockades of government offices in protest of various official positions. In Sacramento, *Libertarian Conspiracy* producers, in accord with their minimalist approach to government, decry the criminalizing of marijuana. Tucson access center director Sam Behrend notes that both *Libertarian Review* and *Time for Hemp*, a regular series by supporters of legalization of marijuana, might become suspect programs; similarly a one-time program in Kalamazoo (MI), *Cannabis*, might not have run. A Fort Wayne late night weekly program, *Ganymedian Slime Mold*, produced by an idiosyncratic leftist, might not be acceptable simply for its unpredictability, according to access director Greg Vawter; another local program *American Atheists* might become suspect, he believes, simply for not conforming to mainstream behavior. In at least one case in a regular program in Portland, OR, a speaker recommended direct and illegal action to protect old timber growth.

Several access centers (Forest Park, OH; Fort Wayne, IN; Sacramento, CA; Kalamazoo, MI; Portland, OR; Dayton, OH; South Portland, ME) reported either local or imported programs opposing abortion, some by Operation Rescue, which either encourage blocking of access to abortion clinics or include graphic, possibly offensive images or both. These programs would be suspect under a gatekeeping arrangement.

In Oregon during election season 1992, ballot measure 9, which would have criminalized some homosexual behavior, was hotly debated on access cable. Oregon access center directors in Portland and Salem both reported extensive use, both in live and taped programs, of access by opposing sides. Both sides incorporated material that might have been perceived as sexually explicit.

Another topical instance was the Gulf War, where access cable was a rare site of dissent, including a series of programs by Deep Dish TV, which packages programs for cable access and transmits them by satellite. This programming was typically controversial. For instance, in Winsted, CT, the Mad River TV access service weathered demands to remove anti-Gulf War programming while it was being cablecast. A production group in Portland, OR, The Flying Focus Video Collective, has taken controversial stands on issues ranging from the Gulf War to local environmental issues.

—programs reflecting the point of view of cultural minorities. For instance, young people eagerly use access cable both to speak to their own peers and to speak about an experience underrepresented in mainstream media. A program wildly popular with teenagers, *Silly Goose*, was for a season a weekly comedy program in at least arguable and certainly adolescent taste in Defiance, OH. (Director Norm Compton recalled one episode that featured the theme of running with scissors.) Other regular local programs in that area that promoted youth culture on access were *Musical Mayhem*, featuring music videos, and *Hard Hits*, a rap show produced by a young African-American man. Similarly, in Olympia, WA, a youth-oriented music video program, *Mosher's Mayhem*, accounts for both a passionate teen audience and also the bulk of the occasional complaints to the service. In Grand Rapids, MI, *Blackwatch* focuses on the language and images of inner city youth. Malden, MA's public access has weathered controversy over youthful productions marked by vulgar language.

—programs that experiment with the form and otherwise stake a claim to art. Such programs have become controversial in Sacramento, Amherst, Davis, CA, Arlington, VA, and on Washington, D.C.'s DCTV system, and have been a perennial source of contention in public access.

In general, then, taped programming regularly appears on public access in ways that simultaneously serve the central mandate of the service and also offend some sensibilities.

LIVE PROGRAMMING

Live programming on public access reveals the social utility of potentially offensive programming in sometimes dramatic ways. Live programming can only be halted with a delay system beyond the budget of most access centers; it can only be dependably safe if both subject and participants can be counted on to avoid the extremes of opinion that presently characterize public access.

Most centers surveyed offer live and interactive programming, and find it draws eager participation from viewers. Access center directors highlighted various kinds of programming demonstrating

the role of access cable an a public forum, which might be in jeopardy under a gatekeeping arrangement:

—sexual and health education. This is an area where live programming often draws an engaged, often young audience. In Chicago, *AIDS Call-in Live* receives phone calls four-fifths of which come from African-American youth, according to director Barbara Popovic. Typical of the kind of interchange was the phone call of one 17-year-old girl who wanted to know how to respond to a boyfriend who assured her they need not use condoms because he was "loyal" to her. The conversation was frank and colloquial on both sides, while also giving the girl much needed information. As well, on air, speakers hold up items such as condoms and dental dams, and explain their use. On public access cable in Austin, TX, a program called *Midnight Whispers* frankly encourages viewers to call in to share their sexual fantasies, so that an on-air nurse can respond to them and discuss safe sex practices. The Portland, OR "AIDS Forum Live" similarly might raise concern. A Tucson program, *Bridges*, by and for the disabled, has featured AIDS education involving anatomical models. In Sacramento, the monthly "Health in America" program on alternative and holistic health options, has featured graphic image of women with mastectomies and damaged breast implants. The director of the Defiance, OH, center (which also carries government and educational programming) even wonders what might happen to city council meetings if, for instance, anti-pornography groups appear.

—topical call-in programs. For instance, in Sacramento within hours of the Rodney King verdict a special edition of the weekly *Live Wire* community call-in program was airing, with scores of viewers, most apparently African-American, responding to a host known in the community for his success in working with alienated youth. Although the staff found that the discussion was less raw than expected, it was also a volatile moment. Programs such as Fort Wayne, IN's program *Speak Out* and Tucson's *You're the Expert* touch on controversial local issues ranging from street signs to police behavior, without any way of predicting how callers might behave. NDC community TV in West St. Paul aired a series *Facts not Friends* around 1992 electoral politics, which the access director

saw as expanding the debate. In South Portland, ME, during the Gulf War, participants suggested illegal actions as protest.

—minority cultures. The Fort Wayne, IN program *Coalition for Unlearning Racism*, a live twice-a-month program, deals with topics on which, as access manager Rick Hayes puts it, "people are already irate," and has been the site of heated discussion about racism. Hayes values it not because he thinks it changes the minds of extremists, but because public dialogue, including with extremists, educates the community. Also on the same system is a program *Message to the Black Man*, a black nationalist program that purveys a distinctly minoritarian view in Fort Wayne. In Tucson, teenagers produce a live program called *The Forbidden Zone*, in which they talk in the slang and curse-laden jargon of their peers, involving sexually explicit language and sometimes addressing illegal activities such as drug use. It is also a rare public forum for this cohort; teenagers are far more likely to be the targets of mass media and advertisers' attention than they are to be producers. Similarly, the live teen show *Active Butch/Pensive Willy* in Newton Highlands, MA, has with its raw language in call-ins roused the ire of a board member.

Access directors often singled out live programming as of particular interest to their audience. "Live material like *AIDS Call-in Live* is what's best in access," said Chicago director Barbara Popovic. "If this can't be on, then it's the baby and the bathwater."

PRESCREEING AND BANNING PROGRAMMING

Most access centers surveyed do not prescreen at all, except, as in the case of Washington, D.C. and Dayton (OH) Access Television, a high speed run-through for technical quality. In fact, in one case, that of Somerville (MA) Community Access TV, the present community-run nonprofit began in response to outrage over the cable-run access center's prescreening of tapes. A few do prescreen, sampling programming for technical quality and content. In these cases (e.g., Prince George's Community Television, Landover, MD; Pittsburgh Community Television, Pittsburgh, PA) estimates of time it now takes to do prescreening range from 10 to

18 hours a week; however, this prescreening is not currently done under the constraints of the new law.

Exceptions demonstrate a balancing of concern for family viewing hours with the service's open access policy. In Fairfax, VA, the center prescreens to decide on when to schedule. In Vail, CO, director Suzanne Silverthorn watches "anything that might be in question," while in Amherst Myra Lenburg looks at unsolicited material. Since this kind of prescreening does not need to be comprehensive, it is also a light administrative burden. In Olympia, WA, as in several other access centers including Somerville, there was no prescreening, but producers were given information on guidelines developed in conjunction with the city or cable operator, to place potentially offensive programs on late at night. Many access centers have guidelines and require producers to read guidelines and certify that they abide by them.

Public access directors do become adept at dealing with complaints from viewers, and from city and cable officials. But rarely, in these interviews, had complaints resulted in prohibition of programming, and then usually after it had already run at least once.

Among several reported incidents of attempted programming intervention, two point up the importance of an independent public forum on controversial political issues. For instance, one Cincinnati channel accepted a tape from one political party in 1991 local elections; the other party promptly obtained a restraining order, although it had the right to air a program, and furthermore center staff had volunteered to help produce one. Ultimately, the complaining party lost in court, and the tape was aired. In the small town of Defiance, Ohio, several years ago town officials attempted — again, unsuccessfully — to block a program criticizing the town's plan to privatize emergency medical services.

The two other reported cases involve questions of taste and decency. In Columbus, Ohio, in Sept 1992 the city, which controls transmission from the independent nonprofit center, responded to complaints about frontal nudity in a program on gays and AIDS by dropping the program after it had run. Upon legal consultation,

however, the city reversed its decision because the program could not be considered pornography.

In an ongoing case in Sacramento, the incident appears part of a larger struggle between the center, the city, and the cable company. The cable company representative has seized upon a viewer complaint about a videoplay, *Dinosaurs*, and eagerly argued for shutting down the independently-run center to the city, which allocates its funds. Written and produced by a young local man, the play involved scenes of nudity and sexual aggression as part of the author's social critique. (The center's attorney advised the center the piece was not obscene.) Center director Ron Cooper recalls that the local cable operator, long a grudging supporter of the service, recently warned him that he would "shut you down" and that he had the approval of the multi-system owner to take the case to court.

EXPANDING SPEECH

Calls for banning sometimes result in reasoned accommodation such as the guidelines devised by the aldermanic and cable boards in Somerville, MA. Those guidelines then are given directly to producers. Sometimes, they can act as a powerful threat. When a program by and for teenagers, *Streetwatch*, ran on Columbus Community Cable Access several years ago and frank sexual language offended city officials enough to pull the program from rotation briefly, the board was badly shaken. "When government taps you on the shoulder and tries to crush it at the same time, you take notice," recalled center director Carl Kucharski. He notes that several board members, whose corporations did business with the city, felt particularly vulnerable to official discontent. The board contemplated over a period of months ways to prescreen programming, but could not find a workable arrangement.

Currently access center directors confront controversy by encouraging more speech, not only by allowing all voices a hearing but also by encouraging complainants to make use of training and production assistance, and by explaining the philosophy of the access center. This process appears to expand the forum for speech, not only for producers but for viewers, who may call in.

At Malden (MA) Access TV, director Rika Walsh recalled a program made by local youths in summer 1992 with "what was to my taste and probably yours an excessive amount of profanity." After the program, the center scheduled a two hour call-in, which was vigorously used. For Walsh, "That's what public access is all about—creating that public space. It allows the community to speak to issues; it's not just about the programming itself."

At Waycross Community TV in Forest Park, Ohio, director Greg Vawtar pointed to response to a racial hate text message posted on a nearby suburban system. Several of his access center's board members composed and aired passionate arguments against intolerance, part of a community-wide electronic conversation. Director Rick Hayes of the Fort Wayne, IN library system's public access channel noted that a well-established twice-weekly program, *Coalition for Unlearning Racism*, supported by the local NAACP and Urban League among others, began as a response to the possibility of carrying the Ku Klux Klan's *Race and Reason* (which never did run). Making the program also brought together nine groups that hitherto had not worked jointly.

COST OF PRESCREENING

The provisions on prohibition of programming and liability for obscene material in the 1992 Act would change the terms of PEG access dramatically. Implementing prohibitions such as the law now permits might involve, as the Federal Communications Commission has suggested (U.S. FCC 1992, p. 7), certifications to the operator. These would seem to necessitate some kind of prescreening or pre-emptive judgment on the safety of certain kinds of programming.

Aside from the question of mandate, in practical terms how would a requirement to certify and thus prescreen programming affect the current practice of access centers? Access center directors estimated typically that between a day a week and two full-time staff jobs would be required to prescreen and assess programming for the channel. (Some systems generate more than 3,500 program hours a year.) All but one estimated it would delay programming. No directors suggested it was possible to increase budgets in a difficult economic period, and all suggested that the

job would be done by someone at or near the top, usually themselves. Hap Haasch of Ann Arbor Community Access TV noted, "The real cost is not having staff available for almost a third of the work week."

The cost would thus be measured in terms of lost production assistance, training, and community outreach—in short, a crippling of the service itself. One director in Fitchburg, MA, called the time required "devastating to our already busy schedule."

In nine cases (Anderson Community TV, Cincinnati, OH; Winthrop, MA; Salina, KS; Holland, MI; Turner's Falls, MA; Ann Arbor, MI; Grand Rapids, MI; Fort Wayne, IN; Forest Park, OH; Glenview, IL) directors said they would probably have to drop all live programming. In others, such as Cincinnati Community Video, some live programming would be eliminated.

"There is not enough staff to supervise call-in lines or audio, control guests on programs or distinguish between 'safe' and 'dangerous' programs," wrote the director for Winthrop (MA) Community Access TV. Thus, he noted, programs of indisputable value might be lost. For instance, on October 30, 1991, when a terrible storm swept the area, the cable service provided seven hours of live coverage, giving information about street closings, flooding, evacuation routes and emergency shelters. Such programming, he suggested, would be eliminated along with all other live programming under certification or prescreening arrangements.

In Cincinnati, OH, Intercommunity Cable Regulatory Commission official Patricia Havlik said, "We'd probably have to drop the public access program—we can't afford to prescreen, we have no facilities or staff for it."

Access directors have evolved a variety of mechanisms to deal with first-amendment rights conflicts, which appear to have worked fairly well. The process has renewed their commitment to public access as a broad public forum, open even to repugnant speech. Several access directors, when asked to estimate the cost of implementing some screening process, initially refused to entertain the idea, responding with remarks like "I'd quit first," and "I'd go

into another line of work." The access director for Mad River TV, of Winsted, CT, wrote in answer to a question about the cost of prescreening, "Impossible to budget—we just wouldn't do it." Their attitudes appear reinforced by the record of broadly diverse programming that has a unique venue in public access.

The 1984 Act provides for viewers who reject such a forum. Lock boxes or the consumer option of blocking the channel was required by the Act, for access as well as for commercial channels, and would appear, from this survey, to be widely available. In the 31 interviews conducted, all but one person, who did not know, said the system had the capacity. In two cases, directors interviewed said that the company either appeared unwilling to block the channel or simply did not make public the ability to do so. In the 30 written surveys, 24 reported lockboxes available, although one said that they were not available for public access. By contrast, introducing editorial control over public access could, on the basis of access center directors' experience, violate the central concept of access cable.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TIME WARNER ENTERTAINMENT COMPANY, L.P., Plaintiff,	)	
-against-	)	Civ. No.____
FEDERAL COMMUNICATIONS COMMISSION, and UNITED STATES OF AMERICA, Defendants.	)	

AFFIDAVIT OF JOSEPH J. COLLINS

STATE OF CONNECTICUT)
) ss:
COUNTY OF FAIRFIELD)

Joseph J. Collins, being duly sworn, deposes and states as follows:

1. I am Chairman and Chief Executive Officer of Time Warner Cable ("TWC"), an unincorporated division of Time Warner Entertainment Company, L.P. ("TWE").

* * *

D. The Leased Access Provisions of the 1992 and 1984 Cable Acts

28. Section 612 of the 1984 Cable Act (codified at 47 U.S.C. § 532) requires Cable operators to set aside a substantial portion—up to 15 percent—of their channels for lease to unaffiliated programmers (the "leased access provisions"). Section 612 also provides *inter alia*, that "a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section".

29. As originally enacted, Section 638 of the 1984 Cable Act exempted cable operators from criminal and civil liability with respect to obscene matters that they were compelled to carry on PEG or leased access channels. Section 10(d) of the 1992 Cable Act amends Section 638 so as to eliminate this exemption from criminal and civil liability if a program "involves obscene material".

30. Thus, under Section 638 as amended, a cable operator is exposed to criminal prosecution or civil liability as to obscene programming created by others that the PEG and leased access provisions require the operator to carry. Section 10(a) of the 1992 Cable Act purports to resolve this problem with respect to leased access programming by amending § 612(h) of the 1984 Act to permit a cable operator to prohibit or restrict indecent matter on leased access channels. This power does not extend to PEG programming. As to leased access programming, it requires the cable operator to risk civil liability to an aggrieved leased access programmer, or criminal or civil liability under obscenity laws, if its decisions on obscenity should later be determined to have been incorrect. As to PEG programming the operator cannot even attempt to protect itself from such liability.

31. Neither the 1992 Cable Act nor any other law imposes leased access requirements upon SMATV or MMDS systems, DBS operators or other providers of video programming.

* * *

35. In addition, by subjecting providers of DBS service to far less stringent PEG requirements than cable operators are subjected to under the 1984 Cable Act, the 1992 Cable Act causes irreparable injury to TWC's cable systems by placing them at a competitive disadvantage by favoring DBS speech over TWC'S. TWC is also placed at a competitive disadvantage because neither the 1992 Cable Act, the 1984 Cable Act, nor any other law requires other providers of video programming, including SMATV and MMDS systems and broadcast television stations, to provide PEG channels.

36. The leased access provisions compel TWC to publish the speech of others. These provisions expressly abrogate the editorial discretion of TWC's cable systems and force TWC to be identified with messages it does not wish to convey.

37. The provision of Section 10(d) of the 1992 Cable Act which repeals the immunity from criminal and civil liability with respect to obscene programming carried on PEG and leased access channels causes irreparable injury to TWC by subjecting it to the risk of criminal and civil liability for programming created by others that it does not wish to carry but is required by law to carry. The Provisions of Section 612(h) of the Cable Act permitting TWC to prohibit or restrict obscene programming does not alleviate such injury in that they compel TWC to determine obscenity questions that even Federal courts regard as exceedingly difficult, and TWC remains exposed to criminal or civil liability if a court later disagrees with its determination. Further, these provisions provide no protection whatever as to obscene programming TWC may be required to carry on PEG channels. At least one TWC cable system has already been obligated to hire employees to screen programs for obscenity, even though it did not choose to offer these programs, and would prefer not to do so.

38. By compelling TWC to yield control of a substantial portion of its capacity to unaffiliated programmers, the leased access provisions irreparably injure TWC by impairing its ability to offer programming created by others or by itself that it would prefer to convey and that TWC believes its viewers would prefer and by limiting its ability to offer its own programming.

* * *

Subscription Omitted

Letterhead of InterMedia Partners

David G. Rozzelle
General Partner

November 13, 1992

Sam Behrend
Executive Director
Tucson Community Cable Corp.
124 East Broadway
Tucson, AZ 85702

Dear Sam:

Pursuant to Section 10 of the Cable Television Consumer Protection And Competition Act of 1992, the immunity conferred on Tucson CableVision by Section 638 of the Communications Act for the carriage of obscene programming on public, educational and governmental access channels will be repealed as of December 4, 1992. Accordingly, our lawyers advise us that we face potential civil and criminal liability for any obscene material carried on Channel 12.

Therefore, I must reluctantly request that all programming which contains sexual, excretory or other behavior or depictions, or language which potentially may be offensive to the citizens of Tucson be sent to our system for screening *before* it is cablecast by TCCC over our cable system. Moreover, no live programming should be cablecast which contains such material. All such programming should be taped and sent to us for screening as outlined above. Failure to adhere to this request will result in legal action by us seeking to prevent reoccurrence.

I personally believe that the present arrangement between the City, TCCC and the system is the best way to operate a public

access channel. That view is clearly not shared by our elected representatives and Tucson CableVision cannot permit itself to be liable for program content which is the exclusive province of a third party. I am hopeful you will understand the conundrum in which we find ourselves.

I will be in Tucson the week of December 7. I would like to meet with you during the week if you have the time.

Very truly yours

David G. Rozzelle
Chief Executive Officer,
Cable Operations

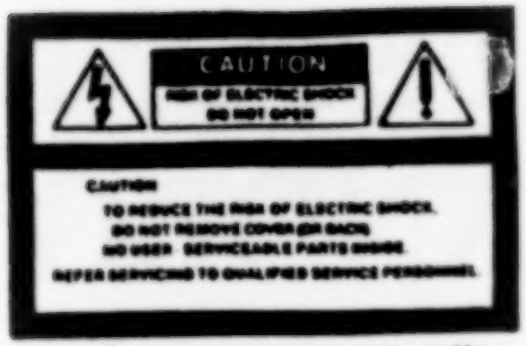
cc: Clayton Hamilton
Brad Detrick, Esq.
Alan Mutter
Wendell Owen

CUSTOMER HANDBOOK

Jerrold IMPULSE 7000

Model DP71**, DPV72** and DPBB73**
Addressable Converters

GENERAL



Graphical symbols and supplemental warning marking located on bottom of converter.

WARNING: TO PREVENT FIRE OR SHOCK HAZARD, DO NOT EXPOSE THIS APPLIANCE TO RAIN OR MOISTURE.

The lightning flash with arrowhead symbol, within an equilateral triangle, is intended to alert the user to the presence of uninsulated "dangerous voltage" within the product's enclosure that may be of sufficient magnitude to constitute a risk of electric shock to persons.

The exclamation point within an equilateral triangle is intended to alert the user to the presence of important operating and maintenance (servicing) instructions in the literature accompanying the appliance.

This installation should be made by a qualified service person and should conform to all local codes.

REPAIR: If you find the unit in need of repair, contact your cable system operator for repair or replacement.

NOTE TO CATV SYSTEM INSTALLER:
This reminder is provided to call the CATV system installer's attention to Article 820-22 of the NEC that provides guidelines for proper grounding and, in particular, specifies that the cable ground shall be connected to the grounding system of the building, as close to the point of cable entry as practical.

IMPORTANT SAFEGUARDS

1. READ INSTRUCTIONS — All the safety and operating instructions should be read before the appliance is operated.

2. RETAIN INSTRUCTIONS — The safety and operating instructions should be retained for future reference.

3. HEED WARNINGS — All warnings on the appliance and in the operating instructions should be adhered to.

4. FOLLOW INSTRUCTIONS — All operating and use instructions should be followed.

5. CLEANING — Unplug this video product from the wall outlet before cleaning. Do not use liquid cleaners or aerosol cleaners. Use a damp cloth for cleaning.

6. ATTACHMENTS — Do not use attachments not recommended as they may cause hazards.

7. WATER AND MOISTURE — Do not use this equipment near water — for example, near a bath tub, wash bowl, kitchen sink, or laundry tub, in a wet basement, or near a swimming pool, and the like.

8. ACCESSORIES — Do not place this video product on an unstable cart, stand, tripod, bracket, or table. The video product may fall, causing serious injury and serious damage to the appliance. Use only with a cart, stand, tripod, bracket, or table recommended by the manufacturer, or sold with equipment. Any mounting of the appliance should follow the manufacturer's instructions, and should use a mounting accessory recommended by the manufacturer.

9. VENTILATION — Slots and openings in the cabinet are provided for ventilation and to ensure reliable operation of the equipment and to protect it from overheating. The openings should never be blocked by placing the video product on a bed, sofa, rug, or other similar surface. Equipment should never be placed near or over a radiator or heat register, or in a built-in installation such as a bookcase or rack unless proper ventilation is provided.

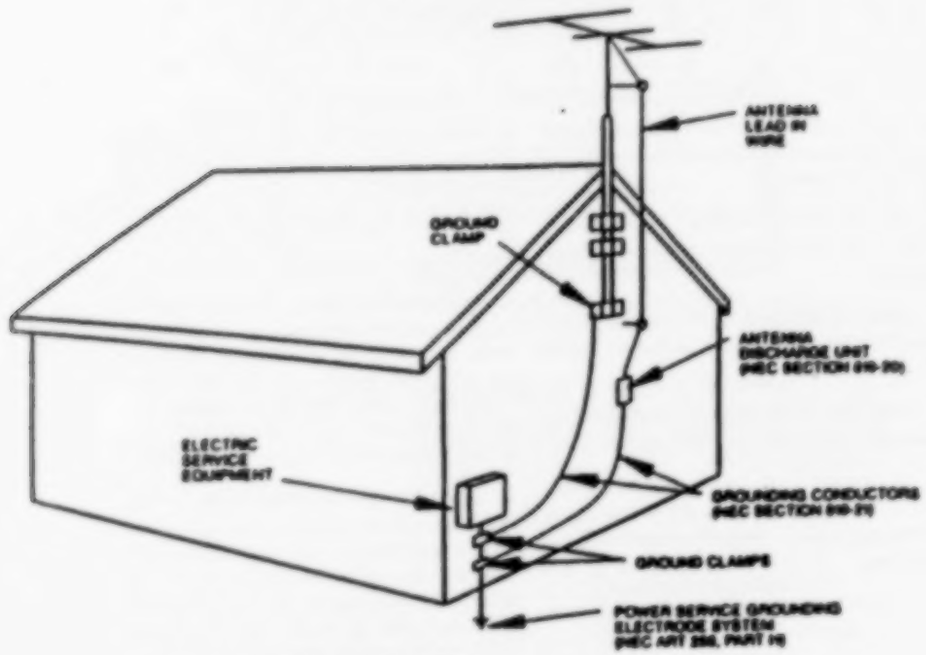
10. POWER SOURCES — This video product should be operated only from the type of power source indicated on the marking label. If you are not sure of the type of power supplied to your home, consult your local power company. For equipment intended to operate from battery power, or other sources, refer to the operating instructions.

11. GROUND OR POLARIZATION — This equipment may be equipped with a polarized alternating-current line plug (a plug having one blade wider than the other). This plug will fit into the power outlet only one way. This is a safety feature. If you are unable to insert the plug fully into the outlet, try reversing the plug. If the plug should still fail to fit, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the polarized plug.

ALTERNATE WARNINGS — This equipment may be equipped with a 3-wire grounding-type plug, a plug having a third (grounding) pin. This plug will only fit into a grounding-type power outlet. This is a safety feature. If you are unable to insert the plug into the outlet, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the grounding-type plug.

12. POWER-CORD PROTECTION — Power supply cords should be routed so that they are not likely to be walked on or pinched by items placed upon or against them, paying particular attention to cords at plugs, convenience receptacles, and the point where they exit from the appliance.

FIGURE 75 1
EXAMPLE OF ANTENNA GROUNDING



NEC – NATIONAL ELECTRICAL CODE

FIGURE 1

43 OUTDOOR ANTENNA GROUNDING
If an outside antenna or cable system is connected to the equipment, be sure the antenna or cable system is grounded so as to provide some protection against voltage surges and built-up static charges. Section 810 of the National Electrical Code, ANSI/NFPA No. 70-1984, provides information with respect to proper grounding of the lead in wire to an antenna discharge unit, size of grounding conductors, location of antenna-discharge unit, connection to grounding electrodes, and requirements for the grounding electrode. See Figure 1.

14. LIGHTNING For added protection for this equipment during a lightning storm, or when it is left unattended and unused for long periods of time, unplug it from the wall outlet and disconnect the antenna or cable system. This will prevent damage to the video product due to lightning and power-line surges.

15. POWER LINES An outside antenna system should not be located in the vicinity of overhead power lines or where it can fall into such power lines or circuits. When installing an outside antenna system, extreme care should be taken to keep from touching such power lines or circuits as contact with them may be fatal.

16. OVERLOADING Do not overload wall outlets and extension cords as this can result in a risk of fire or electrical shock.

17. OBJECT AND LIQUID ENTRY - Never push objects of any kind into this equipment through openings as they may touch dangerous voltage points or short-out parts that could result in a fire or electric shock. Never spill liquid of any kind on the video product.

18. SERVICING – Do not attempt to service this equipment yourself as opening or removing covers may expose you to dangerous voltage or other hazards. refer all servicing to qualified service personnel.

19. DAMAGE REQUIRING SERVICE— Unplug this equipment from the wall outlet and refer servicing to qualified service personnel under the following conditions:

a. When the power-supply cord or plug is damaged.

b. If liquid has been spilled, or objects have fall into the equipment.

c. If the equipment has been exposed to rain water.

d. If the equipment does not operate normally f following the operating instructions. Adj only those controls that are covered by t operating instructions as an improper adjustment of other controls may result in dama and will often require extensive work by qualified technician to restore the equipm to its normal operation.

e. If the equipment has been dropped or the cabin has been damaged.

f. When the equipment exhibits a distinct chan in performance, indicating a need for service

20. REPLACEMENT PARTS – When replacement parts are required, be sure the servi technician has used replacement parts specified t the manufacturer or have the same characteristi as the original part. Unauthorized substitutions ma result in fire, electric shock or other hazards.

21. SAFETY CHECK – Upon completion of an service or repairs to this video product, ask th service technical to perform safety checks t determine that the video product is in prop operation condition.

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The material in this publication is for information purposes only and is subject to change without notice

Your new IMPULSE 7000 converter features the latest technology applicable to cable TV viewing. These instructions were prepared to acquaint you with the operation of IMPULSE 7000. Please read this information carefully. It will help you to get the maximum enjoyment from this product and will give you a better understanding of its application for your cable TV system and your home video and audio system needs.

OPERATING SUGGESTIONS

1 Aim the remote control directly at the converter. Be sure there are no obstructions between the remote control and the converter.

2 Press and release buttons one at a time, firmly and deliberately.

3 Be sure the TV set is tuned to the converter channel (CH 2, 3 or 4). Your cable installer will tell you which channel to tune.

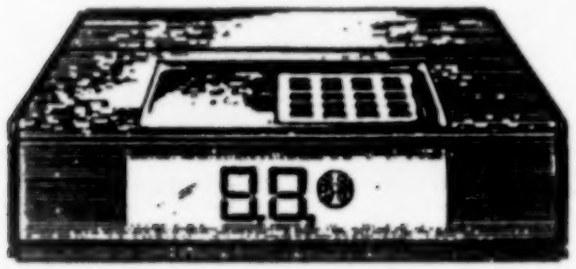
OPERATING SUGGESTIONS

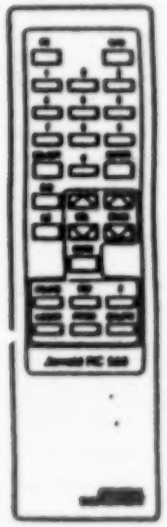
4 Place the converter on a smooth, flat surface. Air should circulate freely under and around the converter. DO NOT place anything on top of the converter.

5 If the display flickers and the converter will not change channels, unplug the converter from the 117 Vac wall outlet, wait ten seconds or longer plug the converter in again and press the ON/OFF key to turn the converter on again.

6 If channels can be changed with the converter buttons, but not with the remote control, check the battery. If the battery is weak or dead, replace it.

CONVERTER



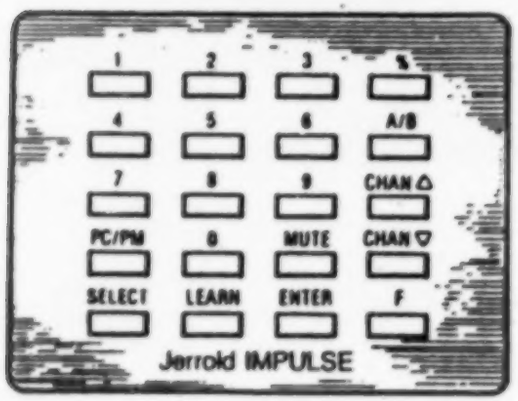


The IMPULSE 7000 converter has been provided by your cable operator to enhance your cable viewing pleasure. It contains a number of features to give you greater convenience in home entertainment.

Among the many features are remote control capability, parental control, favorite channel programming, last channel recall, and attractive styling that is sure to match any decor. Twenty buttons are provided on the top of the converter and corresponding buttons are included on the handheld unit so you have the option of direct or remote channel entry.

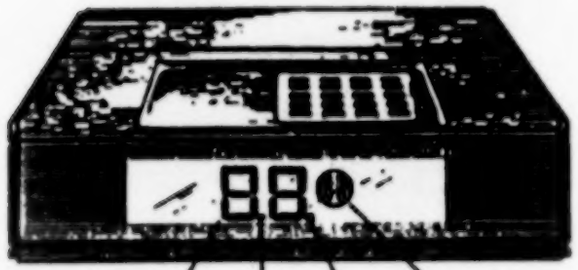
Be sure to read this customer handbook, noting the use of all the features of your new IMPULSE 7000 converter and its remote control.

CONVERTER CONTROLS



The keys on the converter keypad control the same functions as the like keys on the remote control unit. Refer to the following pages for details.

CONVERTER INDICATORS



CHANNEL INDICATOR

Shows cable channel selected.
Do not block or place objects in front of this area.

P

PARENTAL CONTROL INDICATOR

Lights when channel currently tuned is selected for parental control.

B

CABLE INDICATOR

(Only applicable when unit is equipped with an A/B switch.)

If the unit is equipped with an A/B switch, this indicator lights when cable B is selected; it does not light when cable A is selected. In a dual cable system, it will light when cable B is selected. In a single cable system, it will light when an alternate source is selected.

REMOTE CONTROL AND CHANNEL SELECTION

NUMERIC KEYS

Press two keys, one at a time, to select channel.

Examples: 10
06

FC

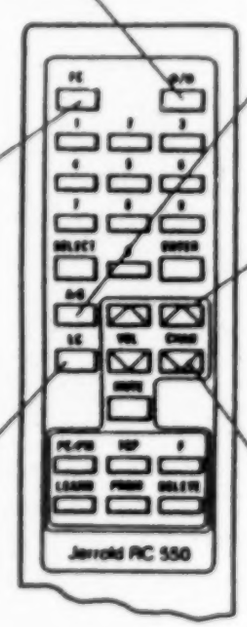
FAVORITE CHANNEL RECALL

Press to step through favorite channels.

LC

LAST CHANNEL RECALL

Press once to recall last channel tuned. Press again to return to current channel.



I/O

ON/OFF

Press once to turn converter on. Press again to turn off.

A/B

Dual Cable System:
Press to switch between cables.

Single Cable System:
Press to switch between converter and VCR (if applicable).

CHAN

CHANNEL UP

Press and release to select next higher channel. Press and hold to scan upward.

CHAN

CHANNEL DOWN

Press and release to select next lower channel. Press and hold to scan downward.

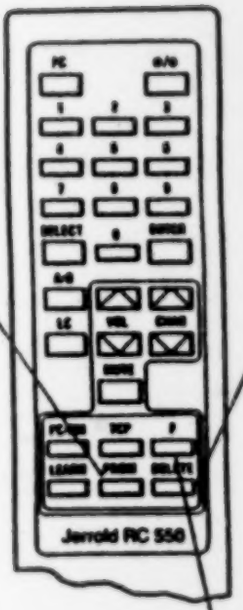
FAVORITE CHANNEL OPERATION

TO ADD A CHANNEL

1. Tune to the channel desired.
2. Press PRGM.
3. The channel is now a favorite channel.

TO REMOVE A CHANNEL

1. Tune to the channel desired
2. Press DELETE
3. The channel is no longer a favorite channel.



TO SCAN FAVORITE CHANNELS

Press FC to step to next higher favorite channel.

TO REMOVE ALL FAVORITE CHANNELS

1. Press F.
2. Press DELETE
3. There are no longer any favorite channels.

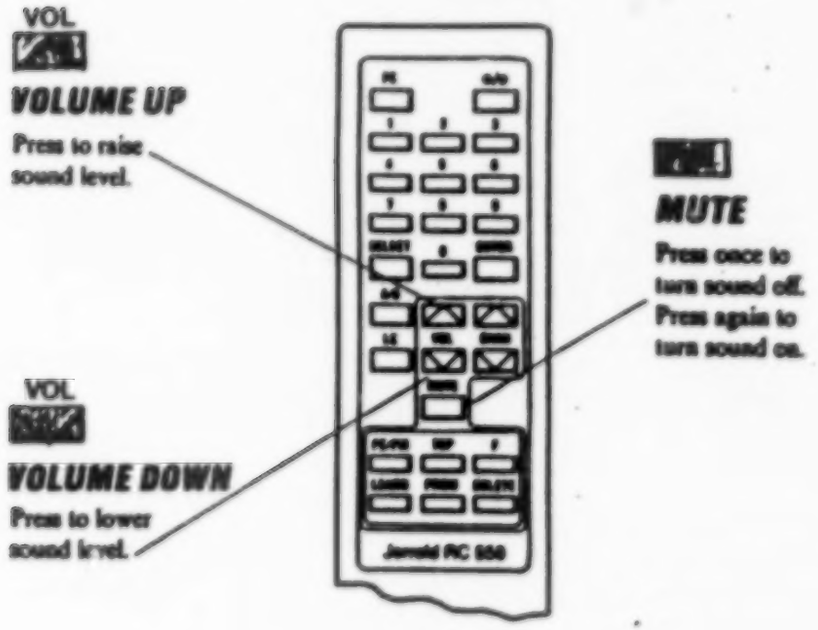
SLEEP TIMER FEATURE

This feature allows the subscriber to program the converter to turn-off after a selected time interval has expired. Using the 'F' and 'PRGM' keys, the subscriber can program the converter to shut-off after a sleep-timer interval of 30, 60, or 90 minutes as described below.

ACTION	CONVERTER DISPLAY	COMMENT
1 Press F, then PRGM.	00	
2 Press PRGM again to select the desired sleep-timer interval. Press once for 90 minutes, twice for 60 minutes, and three times for 30 minutes.	90	
3 Press ENTER to start the sleep-timer countdown. (Selected channel is displayed) *Any break in the above sequence will cause the converter to revert to the current channel display and will not enable the sleep-timer.*	12	Converter will shut-off after 90 minutes. *Press F, PRGM, then ENTER to disable the sleep-timer after it has been enabled.*

REMOTE CONTROL AND VOLUME CONTROL

Model DP71** does not offer volume control. Check underside of converter for model name.



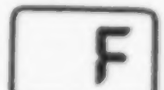
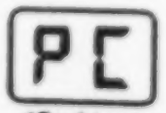
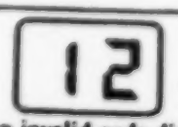
NOTES

To set volume control level initially:

1. Press "F" then "mute" on handheld. This sequence will adjust the converter to a level that will provide maximum separation on a stereo signal.
2. Raise TV volume to maximum comfort level.
3. Sound volume can now be adjusted to any desired level from the remote control unit.

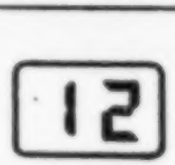
PARENTAL CONTROL DEACTIVATION

Since the unit is automatically placed into parental control when turned on, parental control must first be deactivated before selecting parental control channels or before programming a parental control code.

ACTION	CONVERTER DISPLAY
1 Press F	
2 Press PC/PM	 *(flashing)*
3 Enter parental control code (If code is not programmed in, go directly to step 4. See page 12 for programming.)	
4 Press ENTER	
The channel number will appear on the converter display and the channel can now be added or deleted from the parental control list.	Entering an invalid code displays a "P1" message. Three unsuccessful attempts to enter a valid code displays a "P2" message and disables parental control for 15 minutes.

PARENTAL CONTROL CHANNEL SELECTION

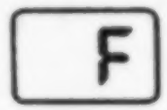
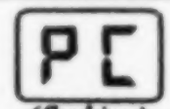
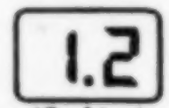
When unit is turned on, parental control is automatically activated. In order to select channels for parental control, the control must first be deactivated. See page 10.

ACTION	CONVERTER DISPLAY
1 Tune the channel which is to be parentally controlled (for example channel 12).	
2 Press PC/PM The "P" indicator on the display will light. If the unit displays "PL", the unit is locked. The unit must be unlocked prior to programming. (see page 9)	
3 Repeat steps 1 and 2 for all desired parentally controlled channels.	

PARENTAL CONTROL ACTIVATION

The unit can be locked by either turning the unit off and then on or by following the instructions below:

Select channels to be controlled (see page 11).

ACTION	CONVERTER DISPLAY
1 Press F	
2 Press PC/PM	
3 Press ENTER	 *(flashing)*
Converter display will alternate between PC and the channel selected 1.2. This occurs for all parentally controlled channels.	 *(flashing)*

PARENTAL CONTROL
CHOOSING PARENTAL CONTROL CODE

In order to fully secure the parental control feature, the subscriber may wish to choose and program a parental control code into the converter. This capability allows the subscriber to "teach" the converter a code which then must be used to remove parental controls. Again, parental control must be deactivated prior to code programming (page 10).

ENTER PARENTAL CONTROL CODE

ACTION	CONVERTER DISPLAY
1 Press LEARN LEARN	LE
2 Press PC/PM PC/PM	LP

Continued

PARENTAL CONTROL CODE

Continued

ACTION	CONVERTER DISPLAY
3 Press ENTER ENTER	LP *(flashing)*
4 Enter code (up to 4 digits)	LP *(remains flashing)*
5 Press ENTER ENTER (Selected channel is displayed.)	1.2
Any break in the above sequence will cause the converter to revert to the current channel display.	

The code you select can be any number from 0 to 9999 but cannot exceed four digits. If the code selected exceeds four digits, the converter will recognize only the last four digits ——d. If ——orgel—— pare——ontr——e, ca——l ——

PARENTAL CONTROL
CHANGING PARENTAL CONTROL CODE

ACTION	CONVERTER DISPLAY
1 Press LEARN LEARN	LE
2 Press PC/PM PC/PM	LP
3 Enter old code	LP
4 Press ENTER ENTER	LP *(flashing)*
5 Enter new code	LP *(remains flashing)*
6 Press ENTER ENTER (selected channel is displayed.) Any entry error in the above sequence will cause the converter to return to the current channel display	1.2

TIME CONTROLLED PROGRAMMING

This feature allows the subscriber to program the converter for unattended VCR recording. The unit can be programmed to switch to a predetermined channel at a predetermined time and date. Once the unit has been programmed it need not be turned on prior to leaving the home. However, the unit MUST be plugged into a wall outlet; do not plug into a switched outlet.

In the following example, the converter will be programmed for:

Date: 28th
Time: 12:30 p.m.
Channel: 32

TO PROGRAM

ACTION	CONVERTER DISPLAY	COMMENT
1 Press TCP TCP	d 1	d = Day of Month 1 = First event
2 Enter date of event (i.e. 28th of month). See notes for everyday programming. 2 8	-2 28	

Continued

ACTION	CONVERTER DISPLAY	COMMENT
3 Press ENTER ENTER	h 1	Unit is now programmed for the 28th. h = Hour of day 1 = First event
4 Enter hour of event to be programmed. 1 2	- 1 12	
5 Switch between AM and PM via PC/PM button. Notice P indicator on display. PC/PM	1, 2	Without P indicates AM P ON= PM P OFF = AM
6 Press ENTER ENTER	n 1	Unit is now programmed for 12 PM on the 28th. n = minutes 1 = first event
7 Enter minutes of event 3 0	- 3 30	

Continued

ACTION	CONVERTER DISPLAY	COMMENT
8 Press ENTER ENTER	c 1	Unit is now programmed for 12:30 PM on the 28th. c = channel 1 = first event
9 Enter channel of event Switch between A and B cable Via A/B button. Notice B indicator on display. 3 2	- 3 32	B ON = B cable B OFF = A cable
FOR PURCHASING A FUTURE PROGRAM OR EVENT, GO TO PAGE 19		
10 Press ENTER ENTER	d 2	Unit is now programmed to switch to channel 32 at 12:30 PM on the 28th of the month. d = day of month 2 = second event
11 At this point, the above steps are repeated for events 2 - 8.		
12 To exit Time Controlled Programming Press TCP	Current channel	

PURCHASING A FUTURE PROGRAM OR EVENT

Use the following sequence to program the converter for purchasing an event with unattended recording.

CONTINUED FROM STEP 9 PAGE 26

ACTION	CONVERTER DISPLAY	COMMENT
9a Press SELECT	E -	Indicates EVENT programming.
9b Enter your PURCHASE CODE (if code is not programmed, go directly to step 9c. See page 27 for programming a code.)	E -	Display changes in intensity with each digit entered.
9c Press ENTER	32 *(flashing)*	Channel number should be flashing. If it is not flashing the purchase was not allowed.
10 Press ENTER again	d2	Prepurchase via TCP has been programmed. Continue with next event programming or exit TCP mode.

TIME CONTROLLED PROGRAMMING

TCP

OPERATING NOTES AND SUGGESTIONS

GENERAL INFORMATION
All single-digit entries must be preceded by a 0. That is, channel 6 is entered as 06, the 7th of the month is entered as 07.

While in TCP mode, depressing anything other than a NUMBER, SELECT or ENTER will cause the TCP mode to be aborted without retaining programming for this particular slot. If this occurs, simply re-enter the TCP mode via the TCP button and step back to desired programming via the ENTER button, or the + or − button.

If no entry is made while in the TCP programming mode within 40 seconds, the TCP mode will be aborted and the user will be returned to normal converter operation.

No parameters are entered into memory until the ENTER button has been depressed and the next prompt has been displayed.

The subscriber can, at any time, review the TCP entries by pressing TCP then pressing ENTER or + or − in order to step through and review the currently programmed TCP parameters. Pressing TCP again will return the subscriber to normal operation without affecting the TCP entries.

A single-day entry which has been programmed into the TCP memory will be erased from the TCP memory after it has been executed. For this reason TCP will not be activated the same day of the next month unless the unit is reprogrammed to do so.

After a TCP slot has been programmed for a future event purchase, the SELECT and ENTER sequence must be repeated if any changes are made in the event programming entries.

To cancel an event from TCP, simply press DELETE after calling up the event prompt (d1, d2, etc.) on the display.

PARENTAL CONTROL AND TCP

If the subscriber attempts to program a channel currently Parentally Controlled into TCP the converter will display 'PL'. This means the channel the subscriber has chosen to program into TCP is currently locked-out via Parental Control. In order to program this channel into TCP the subscriber must first exit TCP by pressing the 'TCP' Button. Once TCP has been exited the subscriber can deactivate Parental Control by following the instructions on page 9.

Now that the converter is unlocked the subscriber can reenter TCP by pressing the 'TCP' Button and program the unit with the desired information.

Now that the unit is programmed and TCP has been exited the subscriber can relock all Parental Control Channels by following the instructions on Page 10.

NOTE: Even though the converter is now in Parental Control Lock Mode, all Parentally Controlled channels programmed into TCP will become viewable at the time and date programmed into that particular TCP slot. To prevent viewing of Parentally Controlled Channels after an event, program the converter to turn off using the instructions under "Convenience Outlet Programming" on page 22.

DISABLING REMOTE ON CONVERTER

If the subscriber is using two converters, one for normal television viewing and the other for VCR recording, he may wish to disable the remote control capability on the recording converter. By doing so the subscriber can operate the viewing converter with the remote control without affecting the recording converter.

The subscriber can disable the remote control capability by pressing LEARN then ⏻/O, being careful to aim the remote control at the converter to be disabled; LO will appear on the converter display to indicate lock out. To restore the remote control capability, the subscriber again presses LEARN and ⏻/O; the LO indication will disappear from the display and the unit will be in the normal operating mode. Any set-top key depression also disables LO. '.

AUDIO QUALITY

To assure quality audio during TCP recording, press F then MUTE (V̲) before turning the converter off. When the F button is pressed the letter F will be displayed on the converter. When the MUTE button is pressed the display will indicate the current channel. The audio is now set for maximum recording quality.

Continued

EVERYDAY PROGRAMMING

Any single programming slot can be programmed to activate everyday (e.g., tune to channel 3 everyday at 2:00 PM); enter 00 for the day.

Day (00 cannot be entered when setting up a future event purchase (a P3 error code will be displayed)

CONVENIENCE OUTLET PROGRAMMING

The convenience outlet on the rear of the converter can be programmed to switch on and off through TCP. When the subscriber wishes to do this they simply program in the date and time they wish the converter outlet to turn on or off. The subscriber then uses the ⏻/O button in the channel slot to toggle between outlet on and outlet off. The on or off condition is designated by a "on" or "of" on the converter display.

CONVERTER PARAMETERS

In the following, # refers to any particular TCP program slot. All entry slots have an upper and lower limit. If the entry attempted falls outside of these limitations, the terminal will prompt the user again with the appropriate symbol (i.e., if a day outside of the range 00 - 31 is attempted and the user depresses ENTER, the d# symbol will reappear prompting the user to again attempt the entry).

ENTRY SLOT		ALLOWABLE RANGE	COMMENTS
DAY	d#	00 - 31	00 = every day – = unused slot
HOUR	h#	01 - 12	
MINUTE	n#	00 - 59	
CHANNEL	c#	Terminal dependent	

REMOTE CONTROL AND BATTERY REPLACEMENT

MODEL RC-550

The battery used is a 9-volt, rectangular battery, NEDA type 1604 or equivalent. Available at most retail stores.

1. Squeeze and lift the locking tab to remove battery compartment cover.
2. Remove old battery.
3. Snap new battery onto connector.
4. Place battery into compartment and replace cover.

MODEL MRC-550

The MRC-550 uses two 1.5-volt, IEC type R03 (AAA) batteries or equivalent. Available at most retail stores.

1. Slide the battery compartment cover in the direction of the arrow.
2. Remove old batteries and replace with new ones.
3. Align battery compartment cover in tracks and slide upwards until it snaps into place.

ACCESSING IMPULSE SERVICES

Jerrold Impulse 7000 Series

STARFONE™ and STARVUE™

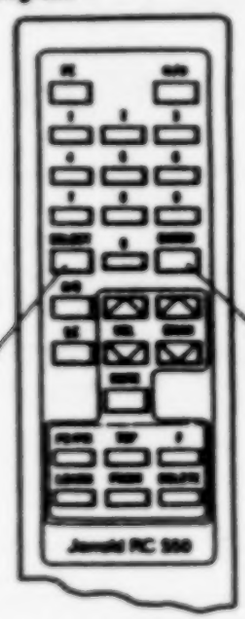
Two-way Converters

The instructions on the following pages are for accessing Impulse services. They pertain to subscribers who have been supplied by their cable system operators with a converter that includes a two-way module. If you are not sure that your converter has such a module, contact your cable operator.

PURCHASING A CURRENT PROGRAM OR SERVICE

For Purchasing a Future Program or Event See Page 16.

When a channel carrying a special program or event which must be purchased separately is selected, an "E" will blink alternately with the channel number on the converter display. The TV will display either a preview of the program selected, if that is in progress, or a barker channel message, until a purchase is made. To purchase the program:—



1 Press and release the SELECT* key.

2 Press and release numeric keys corresponding to your purchase code. SEE NOTE below.

3 Press and release the ENTER key and observe on converter the channel number on continuous display. If the display continues to blink, the purchase has not succeeded and the program cannot be viewed.

NOTE
Omit step 2 if you are not using a purchase code.

Entering an invalid purchase code causes a "P1" message to be displayed on the converter until another key entry is made. Three successive false or unsuccessful attempts to enter a valid purchase code will disable the EVENT key for fifteen minutes and display the "P2" message. See page 31 for error codes.

THE PURCHASE CODE

The PURCHASE CODE is any number of your choice from 1 to 9999.

The number is your secret code and it is optional.

The purpose of the code is to deny (as for example to minor children) the ability to purchase programs without your authorization.

You "teach" your converter your chosen code and the converter stores it in memory. You may:—

1 Enter your code in your converter.

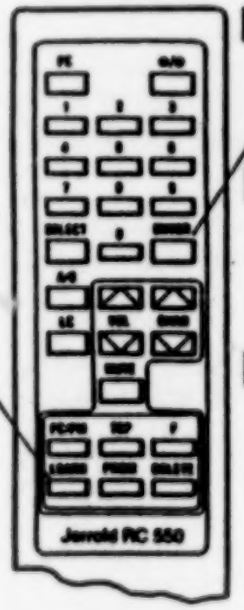
2 Change a previously entered code to a new code.

3 Erase a previously entered code and purchase programs without a code.

REMEMBER YOU CAN IGNORE THE PURCHASE CODE IF YOU WISH

ENTERING A PURCHASE CODE

To enter your PURCHASE CODE:—



1 Press and release the LEARN key and notice the message "LE" on the converter display.

2 Press and release the ENTER key and notice the "LE" message blinking. The converter is ready to accept your code.

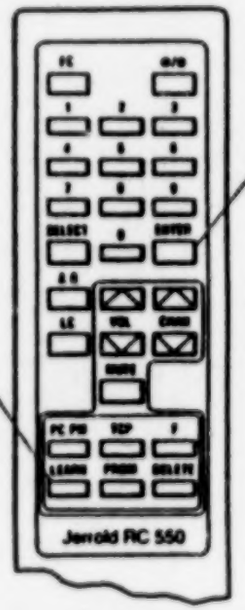
3 Press and release the numeric keys to enter your code (1 to 9999). If more than four digits are entered the converter recognizes only the last four.

4 Press and release the ENTER key and notice the "LE" message disappears. Your code is now stored in the converter memory.

NOTE
If the "LE" message fails to blink, a code cannot be entered. If in step 4 the "LE" fails to disappear, your code has not been stored in the converter and you should try again.

CHANGING A PURCHASE CODE

To change a PURCHASE CODE:—



1 Press and release the LEARN key and notice the "LE" message on the converter display.

2 Press and release the numeric keys to enter your present code.

3 Press and release the ENTER key and notice the "LE" message is blinking. Converter is ready to accept a new code.

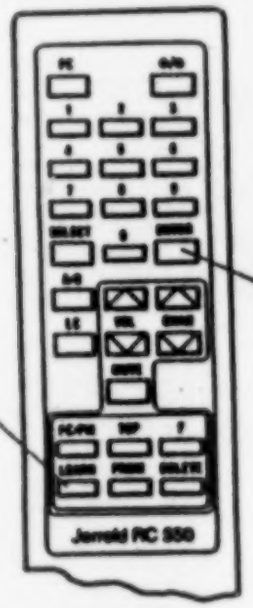
4 Press and release the numeric keys to enter your new code.

5 Press and release the ENTER key and notice the "LE" message disappears. A new code is now stored in the converter memory.

NOTE
Three successive false or unsuccessful attempts to change the purchase code displays the message "P2" and disables the LEARN key for fifteen minutes.

ERASING A PURCHASE CODE

To erase a PURCHASE CODE:—



1 Press and release the LEARN key and notice the "LE" message on the converter display.

2 Press and release the numeric keys to enter your present code.

3 Press and release the ENTER key twice and notice that the "LE" message disappears.

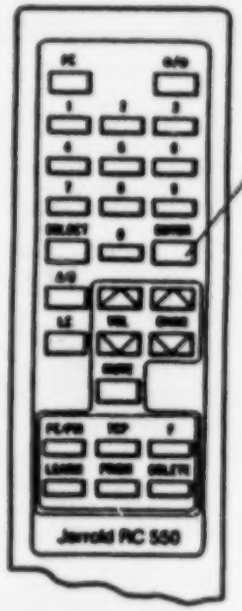
NOTE
Three successive false or unsuccessful attempts to erase a purchase code disables the LEARN key for fifteen minutes and displays the message "P2".

If you have lost or cannot remember your purchase code, you may call your cable company and ask to have your code erased. This request will be followed shortly by a blinking "LE" message on your converter display. When this message is displayed, press and release the ENTER key. The "LE" message will disappear to indicate that your purchase code has been erased.

RESPONDING TO AN OPINION POLL

When you have tuned to a channel on which an opinion poll is in progress, you may choose to participate. When a response to a question is requested, an "r" message blinks to indicate that the converter is ready to accept a response. You respond by:—

1 Entering a number between 1 and 255.



2 Press and release the ENTER key and observe the channel number on display.

If more than three digits are entered, the converter recognizes the last three digits only. If the response is valid the "r" message disappears, indicating that the response has been accepted. If a number larger than 255 is entered, the response is invalid and the "r" message continues to blink.

Pressing any key other than a numeric key or the ENTER key, while the "r" message is blinking will:

1. Remove the "r" message from the display.
2. Nullify any response in progress.
3. Cause the converter to respond to the new command and terminate your participation in current opinion poll.

ERROR CODES

When entry errors have been made or you have selected a disallowed function, an error code appears on your converter display. These codes and the message they convey are:—

CODE	MESSAGE
P1	Wrong secret code
P2	Select or Learn key disabled (penalty timer running)
P3	Everyday prepurchase by TCP not allowed
P4	Credit limit exceeded
P5	Transaction table full
P6	Not used
P7	Credit limit is zero
P8	Valid time stamp not received
P9	Event cannot be purchased

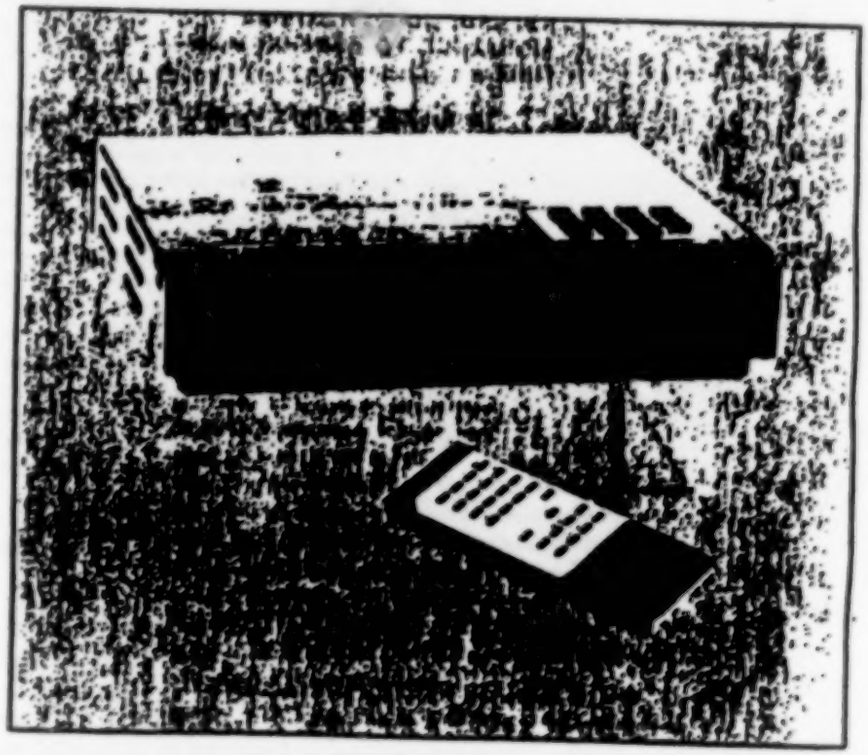
NOTICE

Converters equipped with the STARFONE option are connected to your telephone line. If you don't hear the dial tone over your telephone try the following tests: hang up and try again in a few seconds; disconnect the converter cable connecting to the telephone wall outlet and try again. If there is still no dial tone contact your telephone company. If you are assured by the telephone company that their service is normal and still cannot get a dial tone, contact your cable company and report a defective

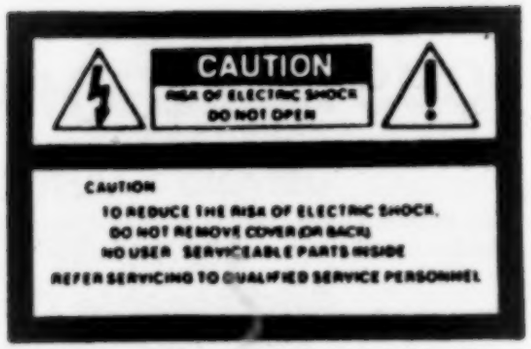
CUSTOMER HANDBOOK

Jerrold STARCOM® VI

Model DPV5-*
Addressable Converter
With Volume Control



GENERAL INSTRUMENT



Graphical symbols and supplemental warning marking located on bottom of converter.

WARNING: TO PREVENT FIRE OR SHOCK HAZARD, DO NOT EXPOSE THIS APPLIANCE TO RAIN OR MOISTURE.

The lightning flash with arrowhead symbol, within an equilateral triangle, is intended to alert the user to the presence of uninsulated "dangerous voltage" within the product's enclosure that may be of sufficient magnitude to constitute a risk of electric shock to persons.

The exclamation point within an equilateral triangle is intended to alert the user to the presence of important operating and maintenance (servicing) instructions in the literature accompanying the appliance.

This installation should be made by a qualified service person and should conform to all local codes.

REPAIR: If you find the unit in need of repair, contact your cable system operator for repair or replacement.

NOTE TO CATV SYSTEM INSTALLER:
This reminder is provided to call the CATV system installer's attention to Article 820-22 of the NEC that provides guidelines for proper grounding and, in particular, specifies that the cable ground shall be connected to the grounding system of the building, as close to the point of cable entry as practical.

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WELCOME

Your new STARCOM VI features the latest technology applicable to cable TV viewing. These instructions were prepared to acquaint you with the operation of STARCOM VI. Please read this information carefully. It will help you to get the maximum enjoyment from this product and will give you a better understanding of its application to your cable TV system and your home video and audio system needs.

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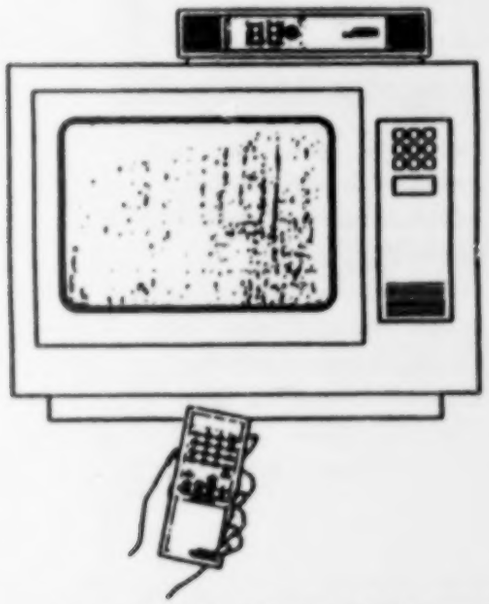
OPERATING SUGGESTIONS



- Aim the remote control directly at the converter. Be sure there are no obstructions between the remote control and the converter.
- Press and release buttons one at a time, firmly and deliberately.
- Be sure the TV set is tuned to the converter channel (CH 2, 3, or 4). Your cable installer will tell you which channel to tune.
- Place the converter on a smooth, flat surface. Air should circulate freely under and around the converter. DO NOT place anything on top of the converter. Adequate cooling requires that the top of the converter be clear.
- If the display flickers and the converter will not change channels, unplug the converter from the 117 Vac wall outlet, wait ten seconds or longer, plug the converter in again, and press the ON/OFF key to turn the converter on again.
- If channels can be changed with the converter buttons, but not with the remote control, check the battery. If the battery is weak or dead, replace the battery.

CONVERTER

The STARCOM® VI Model DPV5-* converter has been provided by your cable operator to enhance your cable viewing pleasure. It contains a number of features to give you greater convenience in home entertainment.

Among the many features are remote control capability, parental control, favorite channel programming, last channel recall, and attractive styling that is sure to match any decor. Nineteen buttons are provided on the top of the converter and corresponding buttons are included on the handheld unit so you have the option of direct or remote channel entry.

Be sure to read this customer handbook, noting the use of all the features of your new STARCOM VI converter and its remote control.

CONVERTER CONTROLS

NUMERIC KEYS *(Shown in black)*

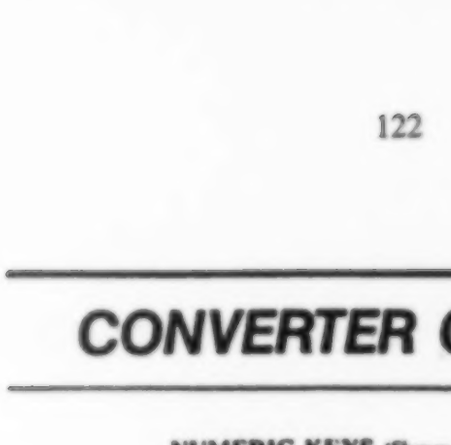
Press two keys, one at a time, to select channel.

Examples: 10
06

8/0 (ON/OFF)
Press once to turn converter on. Press again to turn off.

A/B
Dual Cable System:
Press to switch between cables.

Single Cable System:
Press to switch between converter and VCR (if applicable).



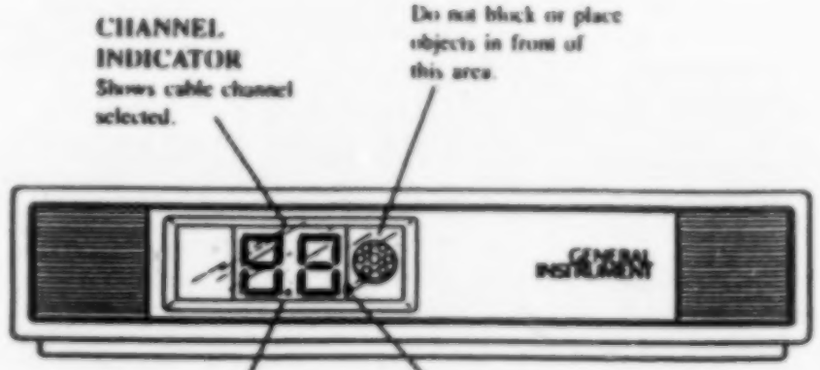
+ (CHANNEL UP)
Press and release to select next higher channel.
Press and hold to scan upward.

– (CHANNEL DOWN)
Press and release to select next lower channel.
Press and hold to scan downward.

CONVERTER INDICATORS

CHANNEL INDICATOR
Shows cable channel selected.

Do not block or place objects in front of this area.



PARENTAL CONTROL INDICATOR
Lights when channel currently tuned is selected for parental control.

CABLE INDICATOR
Lights when cable B is selected. Does not light when cable A is selected. In a dual cable system, this will light when cable B is selected. In a single cable system, this will light when the VCR is selected (if applicable).

REMOTE CONTROL AND CHANNEL SELECTION

NUMERIC KEYS
Press two keys, one at a time, to select channel.

Examples: 10
06

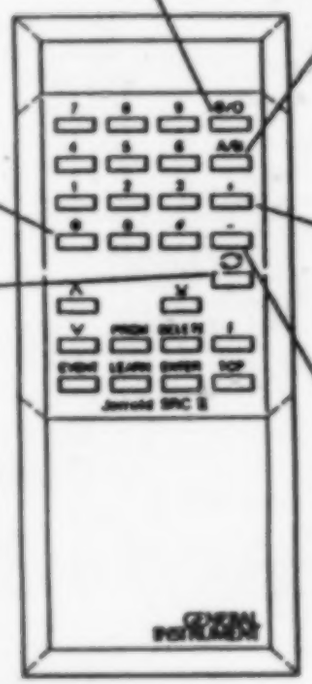
★ PARENTAL CONTROL
Used to select channels for parental control.

(LAST CHANNEL RECALL)
Press once to recall last channel tuned. Press again to return to current channel.

0/0 (ON/OFF)
Press once to turn converter on. Press again to turn off.

A/B
Dual Cable System:
Press to switch between cables.

Single Cable System:
Press to switch between converter and VCR (if applicable).



+ (CHANNEL UP)
Press and release to select next higher channel. Press and hold to scan upward.

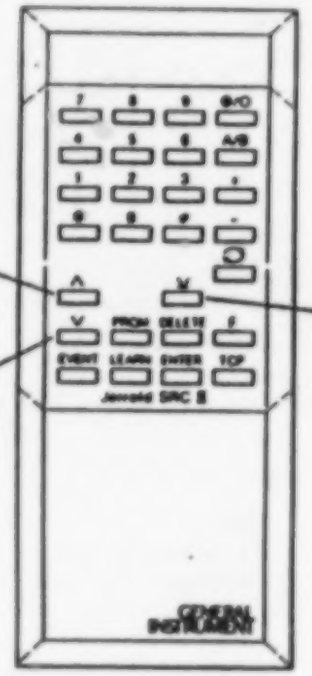
– (CHANNEL DOWN)
Press and release to select next lower channel. Press and hold to scan downward.

EVENT/LEARN/ENTER
(Shown shaded)
Used with Jerrold's STARFONE and STARVUE adapters. Pressing these buttons will have no effect on standard converter oper-

REMOTE CONTROL AND VOLUME CONTROL

∧(VOLUME UP)
Press to raise sound level.

∨(VOLUME DOWN)
Press to lower sound level.



⊻ (MUTE)
Press once to turn sound off. Press again to turn sound on.

NOTE

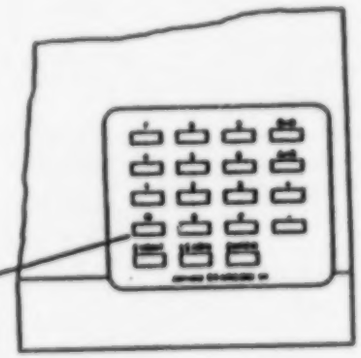
To set volume control level initially:

1. *Raise converter volume to maximum with remote control.*
2. *Raise TV volume to maximum comfort level.*

Sound volume can now be adjusted to any desired level from the remote control unit.

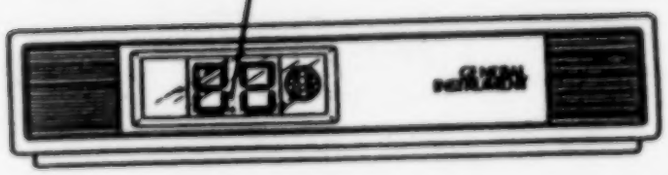
PARENTAL CONTROL SELECTION

1
Tune channel which is to be controlled.



2
Press ★ to select channel for parental control. *(Can also be set from remote control.)*

3
★ indicator will light.

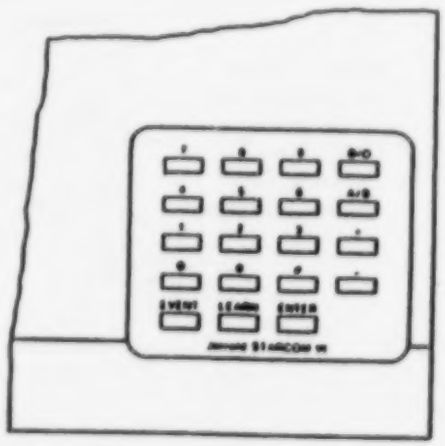


4
Repeat steps 1, 2, and 3 for all desired parentally controlled channels.

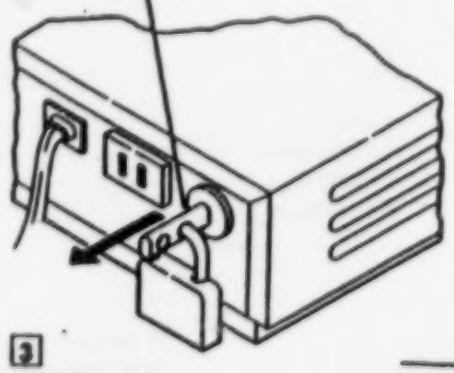
PARENTAL CONTROL ACTIVATION

Plunger Type

1
Select channels to be controlled *(see page 7)*.



2
Pull bar outward about 1/2 inch.



3
Pass shackle of padlock through inner hole.

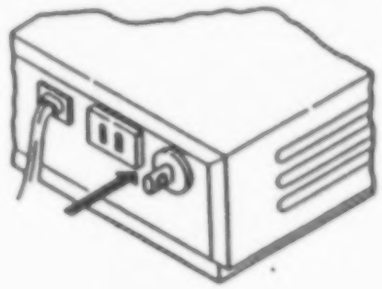
NOTE
User provides padlock with shackle diameter less than 1/4 inch.

PARENTAL CONTROL DELETION

Plunger Type

1

Remove padlock and check that bar on rear panel is retracted into converter. (Only one hole is exposed.)



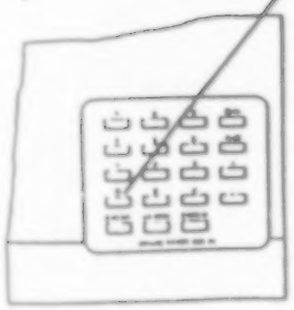
2

Tune channel which is to be uncontrolled.

★ indicator will be lit.

3

Press ★ to deselect channel for parental control. ★ indicator will go out.



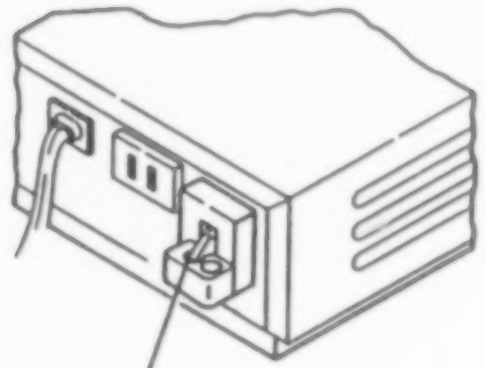
★ indicator will light only on channels which are selected for parental control.

PARENTAL CONTROL ACTIVATION

Clasp Type

1

Select channels to be controlled *(see page 7)*.



2

TO ACTIVATE PARENTAL CONTROL

User provides padlock with shackle diameter less than 1/4 inch.

3

Pass shackle of padlock through this hole.

4

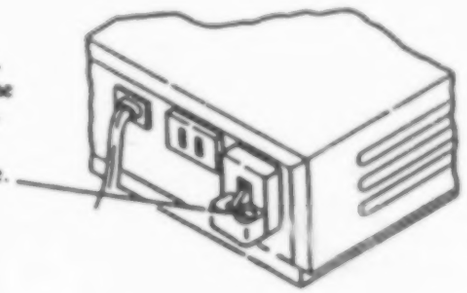
All previously designated parentally controlled channels are now locked OUT.

PARENTAL CONTROL DELETION

Clasp Type

1

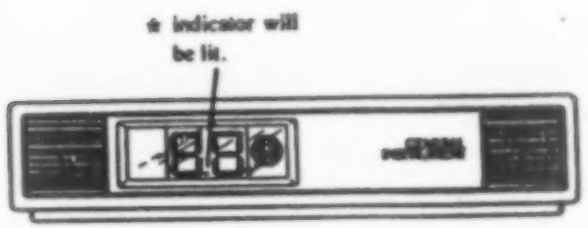
Remove padlock. You may store the padlock by passing the shackle through this hole.



2

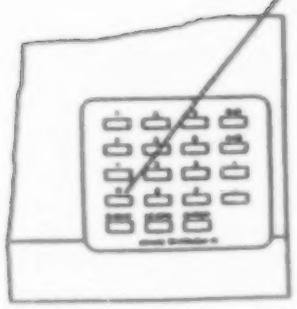
Tune channel which is to be uncontrolled.

★ indicator will be lit.



3

Press ★ to deselect channel for parental control. ★ indicator will go out.



★ indicator will light only on channels which are selected for parental control.

FAVORITE CHANNEL OPERATION

TO ADD A CHANNEL

1

Tune to the channel desired.

2

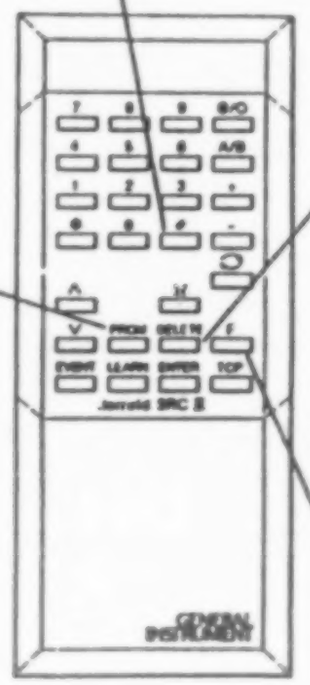
Press PRGM.

3

The channel is now a favorite channel.

TO SCAN FAVORITE CHANNELS

Press # to step to next higher favorite channel.



TO REMOVE A CHANNEL

1

Tune to the channel.

2

Press DELETE.

3

The channel is no longer a favorite channel.

TO REMOVE ALL FAVORITE CHANNELS

(Function available on some models only.)

1

Press F.

2

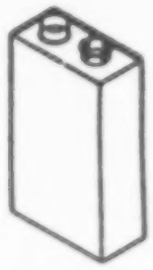
Press DELETE.

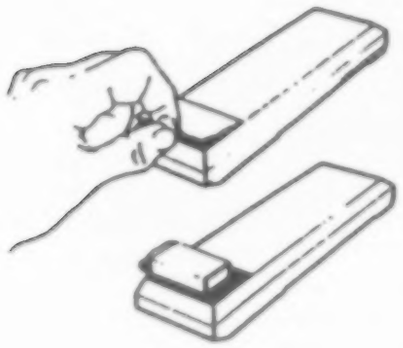
3

There are no longer any favorite channels.

REMOTE CONTROL AND BATTERY REPLACEMENT

The battery used is a 9-volt rectangular battery, NEDA type 1904 or equivalent.



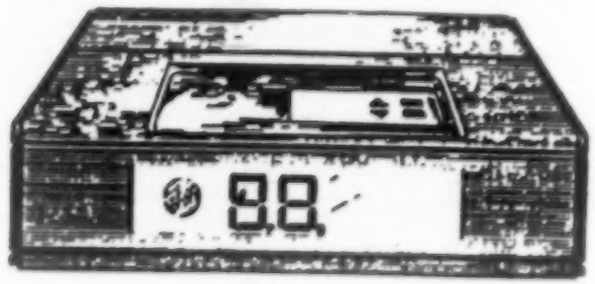


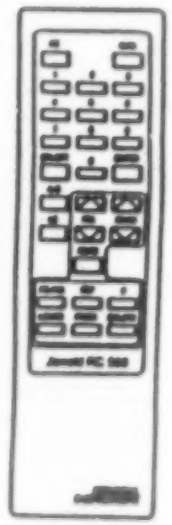
1. Use coin to flip off back cover.
2. Remove old battery.
3. Snap new battery onto connector.
4. Place battery in compartment and replace cover.

CUSTOMER HANDBOOK

Jerrold STARCOM® 7

Model DQN7-*
Digital Plain Converter





GENERAL INSTRUMENT

Graphical symbols and supplemental warning marking located on bottom of converter.

WARNING: TO PREVENT FIRE OR SHOCK HAZARD, DO NOT EXPOSE THIS APPLIANCE TO RAIN OR MOISTURE.

The lightning flash with arrowhead symbol, within an equilateral triangle, is intended to alert the user to the presence of uninsulated "dangerous voltage" within the product's enclosure that may be of sufficient magnitude to constitute a risk of electric shock to persons.

The exclamation point within an equilateral triangle is intended to alert the user to the presence of important operating and maintenance (servicing) instructions in the literature accompanying the appliance.

This installation should be made by a qualified service person and should conform to all local codes.

REPAIR: If you find the unit in need of repair, contact your cable system operator for repair or replacement.

NOTE TO CATV SYSTEM INSTALLER:
This reminder is provided to call the CATV system installer's attention to Article 820-22 of the NEC that provides guidelines for proper grounding and, in particular, specifies that the cable ground shall be connected to the grounding system of the building, as close to the point of cable entry as practical.

IMPORTANT SAFEGUARDS

1. READ INSTRUCTIONS – All the safety and operating instructions should be read before the appliance is operated.

2. RETAIN INSTRUCTIONS – The safety and operating instructions should be retained for future reference.

3. HEED WARNINGS – All warnings on the appliance and in the operating instructions should be adhered to.

4. FOLLOW INSTRUCTIONS – All operating and use instructions should be followed.

5. CLEANING – Unplug this video product from the wall outlet before cleaning. Do not use liquid cleaners or aerosol cleaners. Use a damp cloth for cleaning.

6. ATTACHMENTS – Do not use attachments not recommended as they may cause hazards.

7. WATER AND MOISTURE – Do not use this equipment near water – for example, near a bath tub, wash bowl, kitchen sink, or laundry tub, in a wet basement, or near a swimming pool, and the like.

8. ACCESSORIES – Do not place this video product on an unstable cart, stand, tripod, bracket, or table. The video product may fall, causing serious injury and serious damage to the appliance. Use only with a cart, stand, tripod, bracket, or table recommended by the manufacturer, or sold with equipment. Any mounting of the appliance should follow the manufacturer's instructions, and should use a mounting accessory recommended by the manufacturer.

9. VENTILATION – Slots and openings in the cabinet are provided for ventilation and to ensure reliable operation of the equipment and to protect it from overheating. The openings should never be blocked by placing the video product on a bed, sofa, rug, or other similar surface. Equipment should never be placed near or over a radiator or heat register, or in a built-in installation such as a bookcase or rack unless proper ventilation is provided.

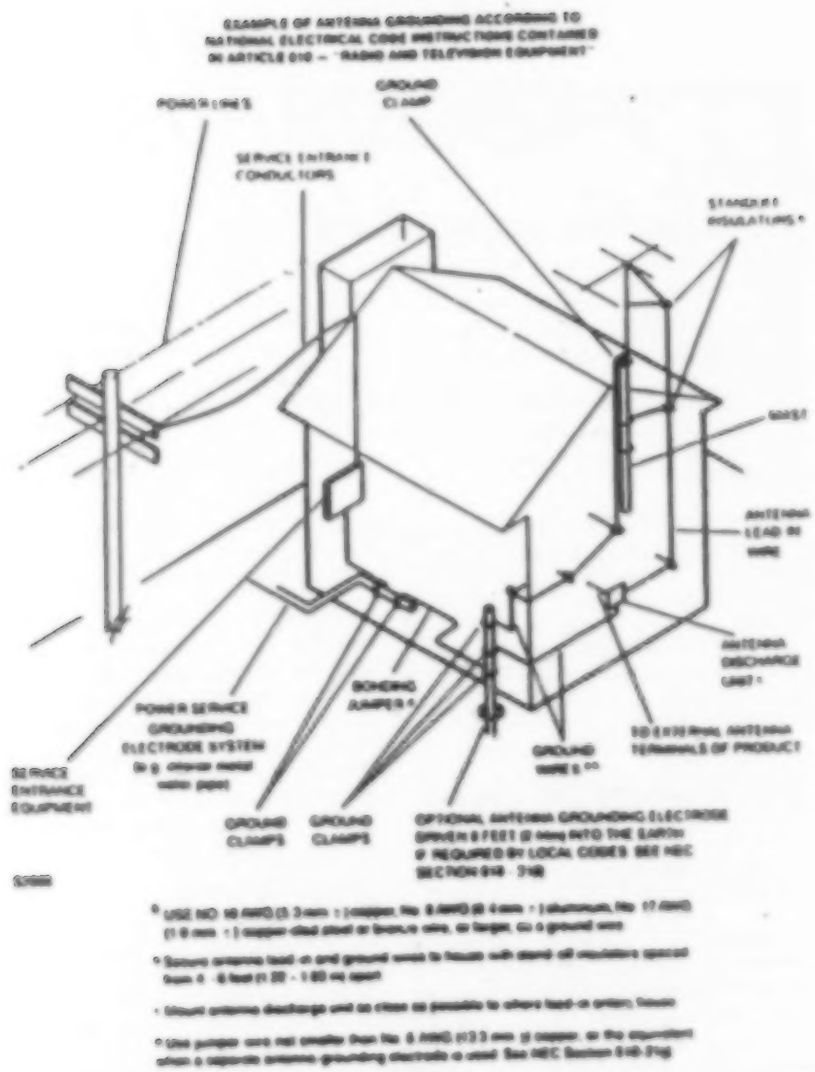
10. POWER SOURCES – This video product should be operated only from the type of power source indicated on the marking label. If you are not sure of the type of power supplied to your home, consult your local power company. For equipment intended to operate from battery power, or other sources, refer to the operating instructions.

11. GROUND OR POLARIZATION – This equipment may be equipped with a polarized alternating-current line plug (a plug having one blade wider than the other). This plug will fit into the power outlet only one way. This is a safety feature. If you are unable to insert the plug fully into the outlet, try reversing the plug. If the plug should still fail to fit, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the polarized plug.

ALTERNATE WARNINGS – This equipment may be equipped with a 3-wire grounding-type plug, a plug having a third (grounding) pin. This plug will only fit into a grounding-type power outlet. This is a safety feature. If you are unable to insert the plug into the outlet, contact your electrician to replace your obsolete outlet. Do not defeat the safety purpose of the grounding-type plug.

12. POWER-CORD PROTECTION – Power supply cords should be routed so that they are not likely to be walked on or pinched by items placed upon or against them, paying particular attention to cords at plugs, convenience receptacles, and the point where they exit from the appliance.

Continued



* USE NO. 10 AWG (5.3 mm) COPPER, NO. 8 AWG (8.4 mm) ALUMINUM, NO. 17 AWG (1.0 mm) COPPER-CLAD STEEL OR BRONZE WIRE, OR LARGER, AS A GROUND WIRE

* SECURE ANTENNA LEAD-IN AND GROUND WIRES TO HOUSE WITH STAND-OFF INSULATORS SPACED FROM 4 - 6 FEET (1.22 - 1.83 m) APART

* MOUNT ANTENNA DISCHARGE UNIT AS CLOSE AS POSSIBLE TO WHERE LEAD-IN WIRES ENTER HOUSE

* USE JUMPER WIRE NOT SMALLER THAN NO. 6 AWG (13.3 mm) COPPER, OR THE EQUIVALENT WHEN A SEPARATE ANTENNA GROUNDING ELECTRODE IS USED. SEE NEC SECTION 810-21(f)

FIGURE 1

13. OUTDOOR ANTENNA GROUNDING - If an outside antenna or cable system is connected to the equipment, be sure the antenna or cable system is grounded so as to provide some protection against voltage surges and built-up static charges. Section 810 of the National Electrical Code, ANSI/NFPA No. 70-1984, provides information with respect to proper grounding of the lead-in wire to an antenna discharge unit, size of grounding conductors, location of antenna-discharge unit, connection to grounding electrodes, and requirements for the grounding electrode. See Figure 1.

14. LIGHTNING - For added protection for this equipment during a lightning storm, or when it is left unattended and unused for long periods of time, unplug it from the wall outlet and disconnect the antenna or cable system. This will prevent damage to the video product due to lightning and power-line surges.

15. POWER LINES - An outside antenna system should not be located in the vicinity of overhead power lines or where it can fall into such power lines or circuits. When installing an outside antenna system, extreme care should be taken to keep from touching such power lines or circuits as contact with them may be fatal.

16. OVERLOADING - Do not overload wall outlets and extension cords as this can result in a risk of fire or electrical shock.

17. OBJECT AND LIQUID ENTRY - Never push objects of any kind into this equipment through openings as they may touch dangerous voltage points or short-out parts that could result in a fire or electric shock. Never spill liquid of any kind on the video product.

18. SERVICING - Do not attempt to service this equipment yourself as opening or removing covers may expose you to dangerous voltage or other hazards. Refer all servicing to qualified service personnel.

19. DAMAGE REQUIRING SERVICE - Unplug this equipment from the wall outlet and refer servicing to qualified service personnel under the following conditions:

a. When the power-supply cord or plug is damaged.

b. If liquid has been spilled, or objects have fallen into the equipment.

c. If the equipment has been exposed to rain or water.

d. If the equipment does not operate normally by following the operating instructions. Adjust only those controls that are covered by the operating instructions as an improper adjustment of other controls may result in damage and will often require extensive work by a qualified technician to restore the equipment to its normal operation.

e. If the equipment has been dropped or the cabinet has been damaged.

f. When the equipment exhibits a distinct change in performance, indicating a need for service.

20. REPLACEMENT PARTS - When replacement parts are required, be sure the service technician has used replacement parts specified by the manufacturer or have the same characteristics as the original part. Unauthorized substitutions may result in fire, electric shock or other hazards.

21. SAFETY CHECK - Upon completion of any service or repairs to this video product, ask the service technician to perform safety checks to determine that the video product is in proper operation condition.

Your new STARCOM 7 features the latest technology applicable to cable TV viewing. These instructions were prepared to acquaint you with the operation of STARCOM 7. Please read this information carefully. It will help you to get the maximum enjoyment from this product and will give you a better understanding of its application for your cable TV system and your home video and audio system needs.

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Converter Controls 4
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Parental Control—Override 12
Remote Control—Battery Replacement 13

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OPERATING SUGGESTIONS

1

Place the converter on a smooth, flat surface. Air should circulate freely under and around the converter. DO NOT place anything on top of the converter. Adequate cooling requires that the top of the converter be clear.

2

Aim the remote control directly at the converter. Be sure there are no obstructions between the remote control and the converter.

3

Press and release buttons one at a time, firmly and deliberately.

OPERATING SUGGESTIONS

4

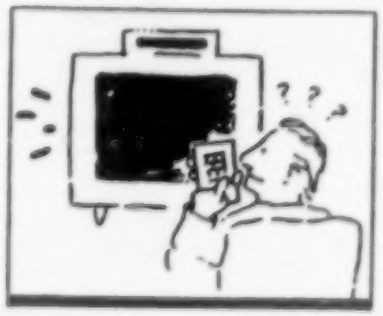
Be sure the TV set is tuned to the converter channel (CH 2, 3 or 4). Your cable installer will tell you which channel to tune.

5

If the display flickers and the converter will not change channels, unplug the converter from the 117 Vac wall outlet, wait ten seconds or longer, plug the converter in again and press the ON/OFF key to turn the converter on again.

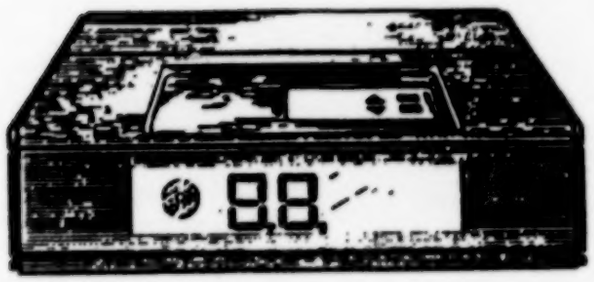
6

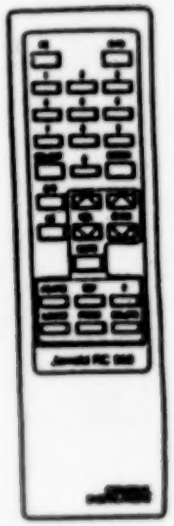
If channels can be changed with the converter buttons, but not with the remote control, check the battery. If the battery is weak or dead, replace it.



If a power outage should occur, or if the converter is unplugged, the converter memory will not "forget" which channels have been designated favorite channels and parental control channels. The converter will come back on to the last channel viewed.

CONVERTER



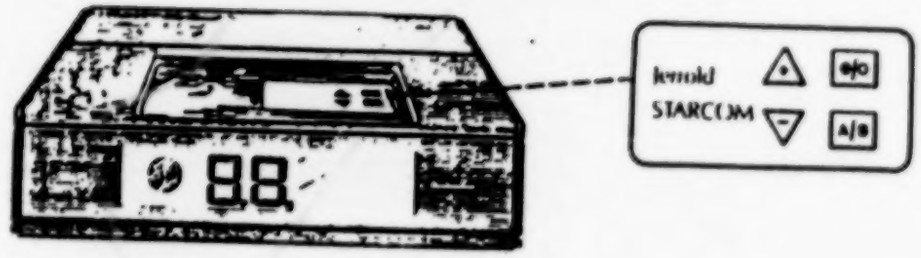


The STARCOM® 7 Model DQN7-* converter has been provided by your cable operator to enhance your cable viewing pleasure. It contains a number of features to give you greater convenience in home entertainment.

Among the many features are remote control capability, parental control, favorite channel programming, last channel recall, and attractive styling that is sure to match any decor. Four buttons are provided on the top of the converter and corresponding buttons are included on the remote control unit so you have the option of direct or remote control of the converter. The remote control unit also provides for control of additional features which cannot be controlled from the buttons on the converter.

Be sure to read this customer handbook, noting the use of all the features to your new STARCOM 7 converter and its remote control.

CONVERTER CONTROLS



CHANNEL UP

Press and release to select next higher channel.

Press and hold to scan upward.

ON/OFF

Press once to turn converter on.

Press again to turn converter off.

CHANNEL DOWN

Press and release to select next lower channel.

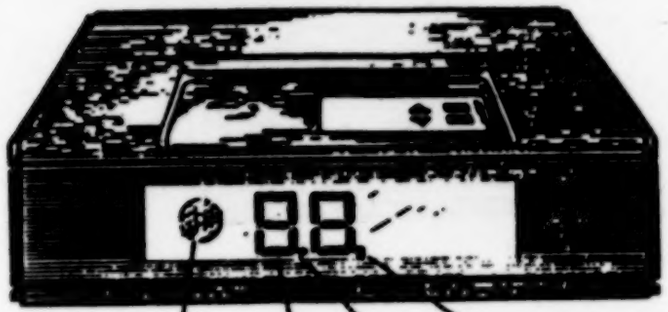
Press and hold to scan downward.

A/B

Dual Cable System:
Press to switch between cables.

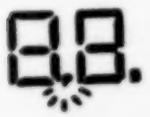
Single Cable System:
Press to switch between converter and VCR (if applicable).

CONVERTER INDICATORS



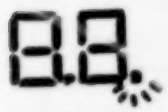
CHANNEL INDICATOR

Shows cable channel selected.
Do not block or place objects in front of this area.



PARENTAL CONTROL INDICATOR "P"

Lights when channel currently tuned is selected for parental control.



CABLE INDICATOR "B"

(Only applicable when unit is equipped with an A/B switch.)

If the unit is equipped with an A/B switch, this indicator lights when cable B is selected; it does not light when cable A is selected. In a dual cable system, it will light when cable B is selected. In a single cable system, it will light when an alternate source is selected.

REMOTE CONTROL AND CHANNEL SELECTION

NUMERIC KEYS

Press two keys, one at a time, to select channel. Examples: 06, 10 All single-digit entries must be preceded by a 0.

FAVORITE CHANNEL RECALL

Press to step through favorite channels.

ON/OFF

Press once to turn converter on. Press again to turn converter off.

Used to enter secret code into memory for Parental Control Override.

CHANNEL UP

Press and release to select next higher channel. Press and hold to scan upward.

CHANNEL DOWN

Press and release to select next lower channel. Press and hold to scan downward.

Used to set secret code for Parental Control Override and to unlock for override.

Dual Cable System: Press to switch between cables.
Single Cable System: Press to switch between converter and VCR (if applicable).

LAST CHANNEL RECALL

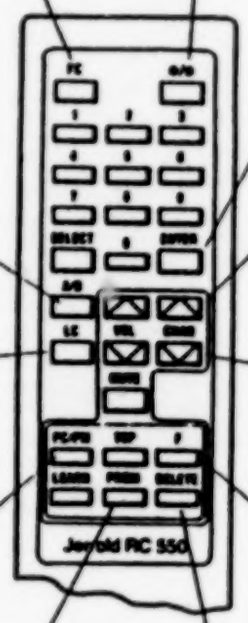
Press once to recall last channel tuned. Press again to return to current channel.

PARENTAL CONTROL

Used to select channels for Parental Control

Used to add a Favorite Channel

Used to remove a Favorite Channel

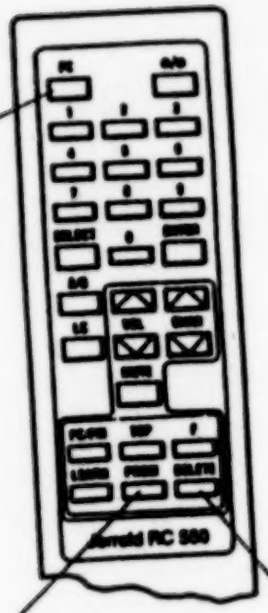


NOTE: The SELECT, VOL, MUTE, TCP, and LEARN buttons have no effect on your converter model DQN7-*.

FAVORITE CHANNEL OPERATION

TO SCAN FAVORITE CHANNELS

Press FC to step to next higher favorite channel.



TO ADD A FAVORITE CHANNEL

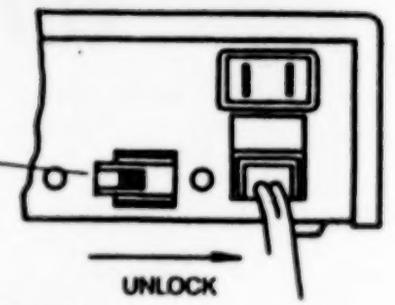
1. Tune to the channel desired.
2. Press PRGM.
3. The channel is now a favorite channel.

TO REMOVE A FAVORITE CHANNEL

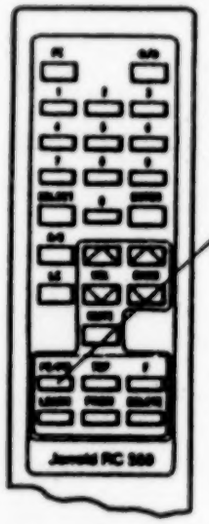
1. Tune to the channel desired
2. Press DELETE
3. The channel is no longer a favorite channel.

PARENTAL CONTROL– CHANNEL SELECTION

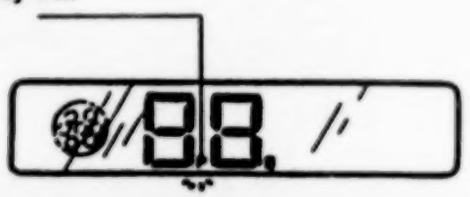
1. Remove the padlock (if already attached) from the bracket on the rear panel of the converter, and place the switch in the unlocked position.



2. Tune the channel which is to be parentally controlled.



3. Press PC/PM to select channel for parental control.
4. P indicator on converter display will light.



5. Repeat steps 2, 3, and 4 for all desired parentally controlled channels.

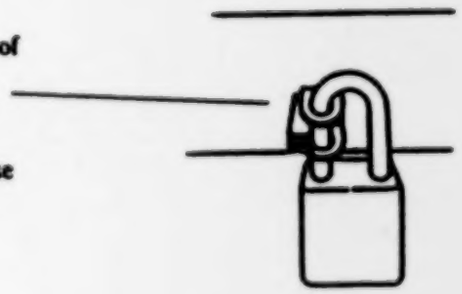
NOTE This portion of the procedure simply identifies the channels to be parentally controlled; it does not lock them out. See next page for activation of parental control feature.

PARENTAL CONTROL– ACTIVATION

NOTE: The user provides a padlock with a shackle diameter 1/16-inch or smaller.

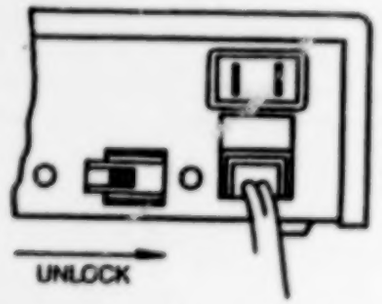
1 After selecting the channels to be controlled (see previous page), push the switch on the rear panel to the locked position.

2 Pass the shackle of the padlock through the two holes in the bracket, and close the padlock.

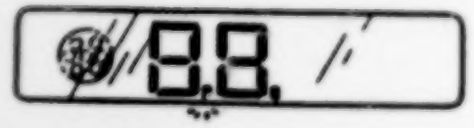


PARENTAL CONTROL– DELETION

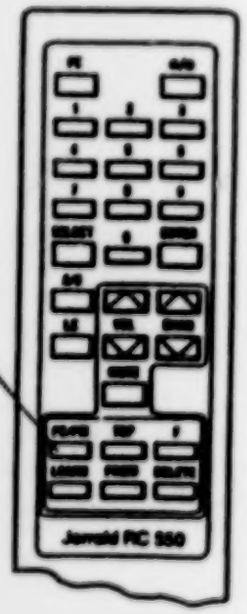
1 Remove the padlock and push the switch on the rear panel to the unlocked position.



2 Tune the channel which is to be uncontrolled. The P indicator will be on.



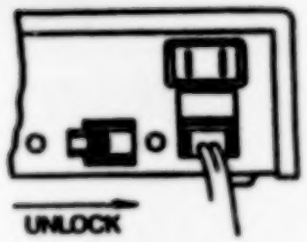
3 Press PC/PM to deselect the channel for parental control.

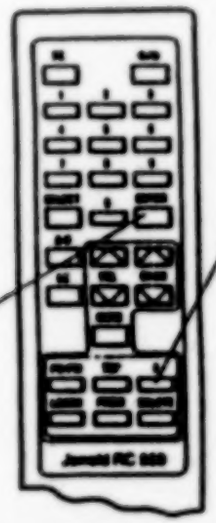


4 The P indicator will go out. The P indicator will be on only for those channels which are selected for parental control.

PARENTAL CONTROL– SET OVERRIDE CODE

1 Remove the padlock and push the switch on the rear panel to the unlocked position.





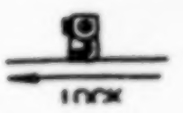
2 Press the F button. The channel indication "——" will display.

3 Press the numbered buttons to select your secret parental control override code. Up to four digits may be used for this code. If more than four digits are pressed, only the last four digits will be used for this code.

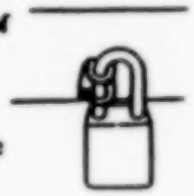
4 Press ENTER to store your secret code in the converter.

If you are slow in entering your code (more than five seconds between numbers), or if you press a button which is not a number, the converter will return to normal operation. IF YOU PRESS "ENTER" AFTER PRESSING "F", WITHOUT SELECTING A SECRET CODE, NO CODE WILL BE ENTERED. TO ENTER A CODE, BEGIN THIS PROCEDURE AGAIN.

5 Push the switch on the rear panel to the locked position.



6 Pass the shackle of the padlock through the two holes in the bracket, and close the padlock.

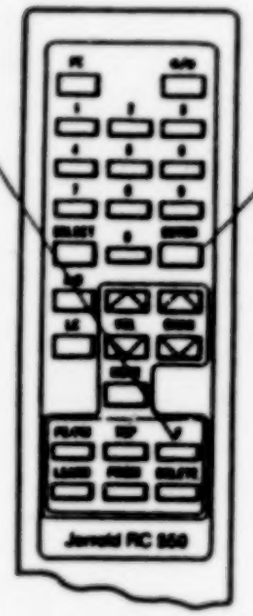


PARENTAL CONTROL– OVERRIDE

The parental control override feature allows you to view those channels designated for parental control without removing the padlock. To override the parental control lockout, follow these instructions:

1 Press the F button. The channel indicator will display "——".

2 Press the numbered buttons to enter your secret code. Up to four digits may be used for your secret code. If more than four digits are pressed, only the last four will be used for the code.



3 Press ENTER. If the correct code was entered, the parental control will be overridden and all parentally-controlled channels may be viewed.

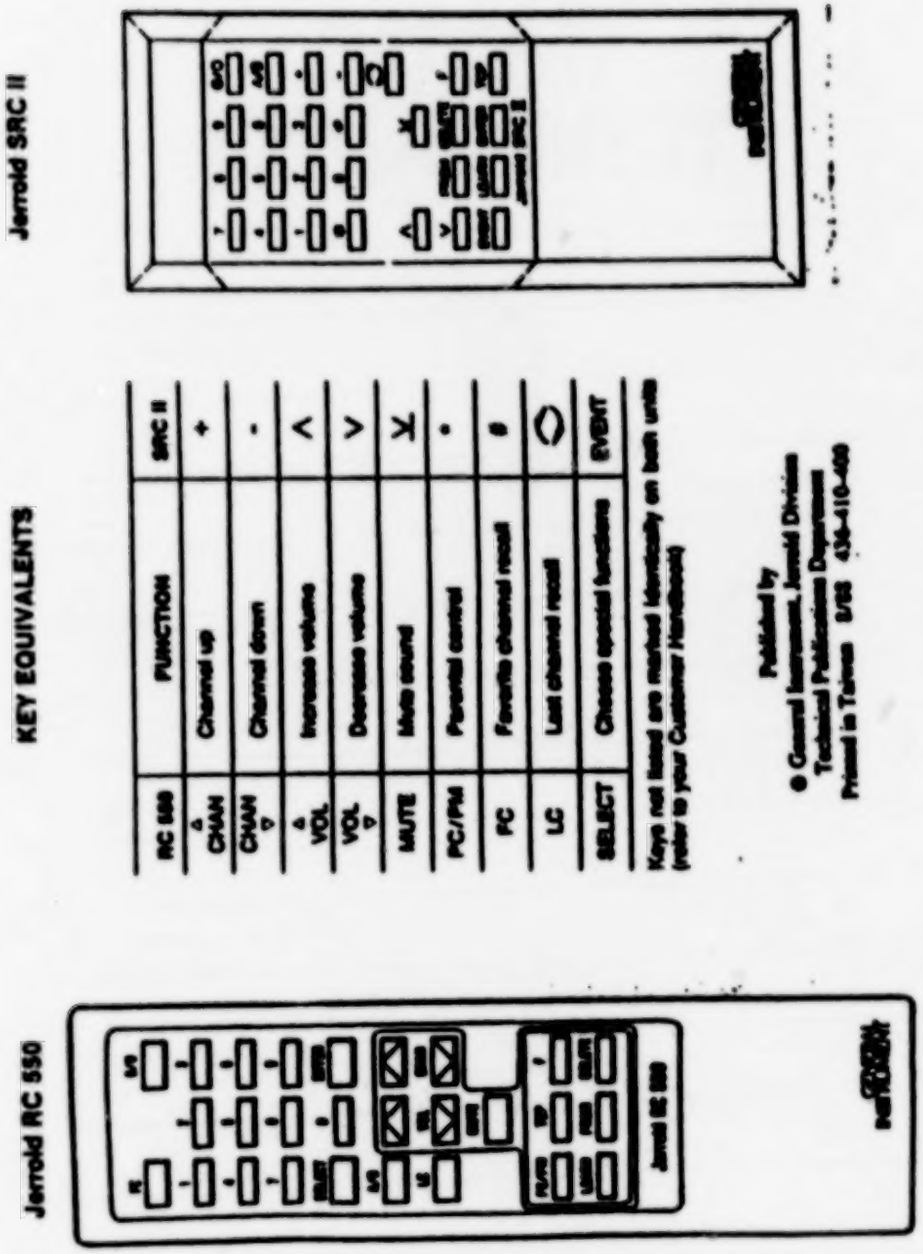
4 To electronically relock the parental control, press the F button twice. If the converter is turned off, the parental control will automatically lock.

NOTE: You have three tries to enter the correct secret code. If the wrong code is entered three times in a row, the converter will not accept override codes for fifteen minutes. On the fourth attempt when you press the F button, the converter will display "E5" for 2 seconds. However, if you chose not to wait fifteen minutes, you can remove the padlock to unlock the parental control.

REMOTE CONTROL— BATTERY REPLACEMENT

The battery used is a 9-volt, rectangular battery, NEDA type 1604 or equivalent.

1. Squeeze and lift tab to remove back cover.
2. Remove old battery.
3. Snap new battery onto connector.
4. Place battery in compartment and replace cover.



FCC Caption Omitted

COMMENTS OF
Ann Arbor Community Access Television

Ann Arbor Community Access Television (AACAT) submits these comments in response to the above captioned proceeding and in support of the comments filed in this proceeding by the Alliance for Community Media, Alliance for Communications Democracy, American Civil Liberties Union and the People for the American Way.

In particular, AACAT agrees that the provisions of Sections 10(c) and 10(d) and the proposed rules all will be unconstitutional. Assuming that the Commission decides to adopt rules to implement either Section 10 (c) or 10(d):

a. The rules should be specific and as narrowly drawn as possible, and must contain limitations that prevent cable operators from hampering use of access channels by those who wish to produce live or cablecast taped programming under the guise of applying the rules. For example, would FCC rules prohibit a program such as "Sexy Minutes", which is produced by a University of Michigan professor with the intent of providing critical answers to questions of human sexuality in a "live call-in" format? This would undoubtably be a detriment to the community!

b. Access centers have very limited resources. The FCC rules should make it clear that any actions taken by an operator under Section 10 must be undertaken at the operator's own expense.

c. Approximately 240 hours of video and 240 hours text programming are cablecast each week on the (3) access channels in my community. Much of the programming is produced by volunteers, and experience shows that it must be as easy as possible for these volunteers to use. The rules must recognize that any roadblocks that are placed in the way for production will result in a reduction in speech.

We believe that the rules must be developed in a manner that the first amendment rights of our volunteer community producers are not abridged. The issue of prior restraint and the appropriate legal remedies should also be addressed in this proceeding.

Respectfully submitted,

/s/

Harry S. Haasch
Cable Administrator
City of Ann Arbor, Michigan

DATE: December 7, 1992

Cover Redacted

JOINT COMMENTS

BLADE COMMUNICATIONS, INC.
MULTIVISION CABLE TV CORP.
PARCABLE, INC.
PROVIDENCE JOURNAL COMPANY
SAMMONS COMMUNICATIONS, INC.

Table of Contents Omitted

Summary

The Commission's Notice of Proposed Rule Making seeks comment on proposed regulations implemented pursuant to the provisions of The Cable Television Consumer Protection and Competition Act of 1992 that restrict access by children to indecent programming on leased access channels and enable cable operators to prohibit the use of "PEG" access channels for obscene programming. While the Companies commenting herein firmly believe that these statutory provisions do not pass constitutional muster, the Commission must nonetheless ensure that the proposed regulations are workable and fair. Accordingly, the Commission should adopt the following recommendations:

- define the relevant "community" for determining standards of indecency as consisting only of cable subscribers, or, in some cases, subscribers to a particular channel or tier.
- allow operators who "sequester" indecent programming on a single leased access channel to count that channel toward the allotment of channels that must be dedicated to leased access and require the programmer to bear

any cost of blocking the channel.

- require programmers to notify operators whether or not programming contains indecent material in advance of channel use and in a specified written format.
- define how an operator's written indecency policy is published, and permit operators to require appropriate indemnification and insurance from programmers.
- establish as grounds for an operator's "reasonable belief" that programming contains indecent material either a programmer's certification to that effect or a programmer's refusal to so certify.
- limit liability for operators who comply with the prescribed regulatory steps for obtaining programmer certification.
- require programmers seeking to air programs on "PEG" access channels to certify whether or not the program contains obscene material and limit operator liability.
- state that operators need not air a leased access program found indecent or obscene by a governmental body.

FCC Caption Omitted

JOINT COMMENTS

Blade Communications, Inc., MultiVision Cable TV Corp., ParCable, Inc., Providence Journal Company,[1] and Sammons Communications, Inc. (hereinafter "Companies"), by their attorneys, hereby submit their Joint Comments in response to the above-captioned Notice of Proposed Rulemaking ("Notice"). Each

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[1] Providence Journal Company conducts its cable television operations through its subsidiaries Colony Communications, Inc. and King Videocable Company.

of the Joint Parties is an owner and operator of cable television systems and, accordingly, will be directly affected by the outcome of this proceeding.

A. Introduction

The Cable Communications Policy Act of 1984 required cable operators to set aside certain channels for use by nonaffiliated programmers through noncommercial "PEG" access or commercial leased access.[2] These provisions, always of questionable status under the First Amendment[3], force cable system operators to carry programming against their own editorial judgment and without regard to the wishes or interests of cable subscribers.

The Cable Television Consumer Protection and Competition Act of 1992, P.L. 102-385 (the "1992 Act"), grafts new requirements on the 1984 access provisions for the purpose of restricting the distribution of "indecent", "obscene" and other material over the access channels. The new provisions run even further afoul of the First Amendment, trampling not only on the rights of the operator, as before, but also now on the rights of the access programmer.

Despite the fundamental constitutional infirmities of the access provisions, the cable industry heretofore has accepted the obligation of providing access as part of its public interest responsibilities. These new requirements will make the burden of complying so difficult and the risk of liability so serious that the industry can no longer acquiesce in what has always been a highly questionable scheme. That the new statutory provisions raise significant new risks and burdens is evidenced by the fact that they were almost

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[2] 47 U.S.C. §§ 531 and 532 (1988).

[3] The status of cable systems as first amendment speakers akin to newspapers is well recognized by the courts *See Leathers v. Medlock*, 111 S. Ct. 1438, 1442 (1991); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); and *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) Thus, the fundamental concept of mandatory access is constitutionally suspect. *See Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) *and see also Century Federal, Inc. v. City of Palo Alto*, 710 F.Supp 1552, 1554 (N.D. Cal. 1987).

immediately challenged in the courts.[4]

Meanwhile, the Commission faces the perplexing task of adopting regulations to implement these difficult and legally precarious provisions. Until the statutory provisions that require these rules are declared unconstitutional — which the Companies are confident they will be — the Commission has no choice but to attempt to make something operable of a flawed and unfortunate situation.

* * *

The Commission already recognizes that cable subscribers need far less protection from obscene or indecent programming than do members of the general public.[8] Unlike programs broadcast on "free" TV or radio, which permeate the airwaves and often come into the home unexpectedly, cable programming must be affirmatively invited into the home through the viewer's act of subscribing to cable service. In addition, the subscriber has the option of buying only basic cable programming and foregoing other tiers, channels or even individual programs that might contain programming he or she considers objectionable. Furthermore, there already is federal legislation that requires cable operators to furnish cable subscribers with "parental control devices" or "lock boxes" to block off or restrict viewing of certain channels in their own homes. *See* 47 U.S.C. § 544(d)(2)(A); 47 C.F.R. § 76.11; 50 Fed. Reg. 18,655 (1985). Finally, a cable subscriber who finds cable programming in general "patently offensive" can cancel the subscription and still receive television programming off-air or through other delivery systems.

* * *

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[4] *See Time Warner Entertainment Company, L.P. v. FCC and United States*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992); *Discovery Channel v. United States*, Civil Action No. 92-2558 (D.D.C. filed Nov. 13, 1992).

[8] *See Report of the Commission* in MM Docket No. 89-494, 67 RR2d 1714, 1726 (1990) and *Notice of Inquiry* in MM Docket No. 89-494, 4 FCC Rcd 8358, 8364 (1989).

Respectfully submitted,

BLADE COMMUNICATIONS, INC.
MULTIVISION CABLE TV CORP.
PARCABLE, INC.
PROVIDENCE JOURNAL COMPANY
SAMMONS COMMUNICATIONS, INC.

By: /s/
Donna C. Gregg

/s/
Michael K. Baker

Their Attorneys

WILEY, REIN & FIELDING
1776 K Street, N.W.
Washington, D.C. 20006

December 7, 1992

FCC Caption Omitted

COMMENTS OF THE BOSTON COMMUNITY ACCESS AND PROGRAMMING FOUNDATION

The Boston Community Access and Programming Foundation is a 501(c)(3) nonprofit corporation established in 1982 to provide public access and community programming to Boston residents. We operate two channels, known as the Boston Neighborhood Network (BNN), on the Boston cable system. Our primary funding comes from Cablevision of Boston.

BNN's access operation provides training and production facilities to Boston residents and institutions wishing to produce programs. We also present staff-produced programming, most notably a daily half-hour neighborhood news program. During our last fiscal year, BNN cablecast 1,326 original access programs, plus 713 original Foundation-produced programs. Including repeats, we cablecast 2,797 *programs*, or 2,319 *hours* of programming.

We work hard to involve ethnic, racial, and linguistic minorities in program production in order to serve the many diverse audiences that comprise our city. Our goal is to make the channel as rich in diversity as the city itself.

We wish to specifically comment on the Commission's proposed regulation, paragraph (d), which would enable a cable operator to prohibit certain types of programming on public, educational and governmental access channels.

A Solution in Search of a Problem

Before promulgating a rule as far-reaching as the one the Commission proposes, the Commission should first establish that there is a problem that needs to be solved. In fact, neither the FCC nor Congress has shown that any problem exists. The Commission, in its *Notice of Proposed Rulemaking*, gives no information at all about whether or not *any* programming actually exists on access

channels that it feels is inappropriate. Congress, in its debate, provided a *single* example: Senator Fowler asserted that access channels are used to solicit prostitution through shams such as escort services and fantasy parties, and Senator Wirth stated that he had seen this material in New York City. *Cong. Rec.*, Jan. 30, 1992, S649-50 (daily ed.). (Even this one example is questionable, since commercial programming is normally carried on *leased* access channels, not public access.)

There are 250 access systems in Massachusetts alone, and literally thousands across the country. To subject *all* of these systems to a complex and burdensome system of regulations because of alleged problems at a single system is a classic case of bureaucratic overkill. What makes this situation more absurd is that, if the alleged programming really does exist in New York City, it could probably be stopped through existing laws dealing with prostitution.

For more than nine years, the Boston Community Access and Programming Foundation has operated one of the nation's largest and most ethnically diverse public access operations. Over this time, we are not aware of any programs that would fall into the categories of prohibited material under the proposed FCC rule, as we understand the rule.

To be sure, we have had programs that were controversial, including some that have offended viewers. We have responded to the issue of "offensive" programming in a way that we feel addresses the legitimate needs of three separate groups: (1) parents who do not want their children exposed to particular programs, (2) adult viewers who would like the opportunity to view a diversity of programs, and (3) producers who are exercising their First Amendment right of free speech.

The process we have devised is as follows: First, we require producers to inform the Foundation, when requesting cablecast time, if a program may be offensive to some audiences or is of a mature nature. The Foundation may require producers to place an appropriate viewer warning at the beginning of these programs. Depending on the nature of the program, the Foundation may also require that the program be cablecast after 10 p.m. or after 11 p.m.

A producer who disagrees with staff decisions on these matters may appeal to a Grievance Committee consisting of three Trustees and two producers.

In fact, there have been *few* disputes, since staff and producers are usually in agreement about the most appropriate time for a program. On two occasions over the past year, the Grievance Committee was asked to decide whether programs were too "offensive" for 10 p.m. time slots. One was a program by an African-American producer of "uncensored" rap music, containing repeated use of an offensive word. The other program was a gay drama, suggesting phone fantasies as the ultimate form of "safe sex." As our most risqué programs, these are the types that would be in jeopardy under the Commission's proposed rule. It is interesting that the programs that would be endangered are programs by and for minority communities—African-Americans and gays.

In Boston, through a community process, we have already accomplished the legitimate intent of the Commission's rulemaking: to minimize the risk that children will be exposed to inappropriate programming. Before subjecting Boston and other access centers to burdensome government regulation, the Commission has an obligation to see whether its goals can and are being accomplished through less intrusive means.

Proposed Rule is Overbroad

The proposed regulation would simply reiterate the language from the Cable Consumer Protection and Competition Act to prohibit "any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Obscenity has been defined by the courts over the years. The public therefore has at least some idea what it means. But the term "sexually explicit" appears to be a new term, never before defined.

In note 11 of its *Notice*, the Commission hints that "sexually explicit" might mean the types of "indecent" programming that the Act says may be prohibited by cable operators over leased access channels, specifically programming that "describes or depicts sexual

or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium."

This interpretation is flawed. The courts have repeatedly ruled that the First Amendment does *not* permit a 24-hour-per-day ban on material that is indecent but not obscene. *The Commission has an obligation to interpret the law in accordance with the Constitution.* The Commission must interpret the law to say that "sexually explicit" programming means exactly the same as "obscenity."

Courts have faced the issue of indecent communications in various cases dealing with cable television, broadcast radio and television, and telephones. In *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985), the Court of Appeals overturned a City of Miami ordinance prohibiting indecent material on the city's cable system. In *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 1281 (1992), the Court of Appeals struck down the FCC's 24-hour-per-day ban on indecent broadcasts over radio and television. In *Sable Communications v FCC*, 492 U.S. 115 (1989), the U.S. Supreme Court ruled that the FCC could not place a total ban on indecent commercial messages (known as "dial-a-porn") over interstate telephone lines. The definition of "indecency" in all three cases was similar to the definition that the Commission apparently believes applies to cable access.

The Supreme Court in *Sable* summed up the constitutional requirement:

> Sexual expression which is indecent but not obscene is protected by the First Amendment. . . The Government may, however, regulate the content of constitutionally protected speech in order to promote a *compelling interest* if it chooses the *least restrictive means* to further the articulated interest.

Sable at 126 (emphasis added). The Court agreed that there *was* a compelling interest in protecting the physical and psychological well-being of minors. However, a 24-hour-a-day ban on indecent material was not a permissible way to achieve that end, since such

a blanket prohibition would deprive *adults* of their ability to receive Constitutionally protected speech. The Court cited ***Butler v. Michigan***, 352 U.S. 380 (1957), where a law was found to be too restrictive when it "denied adults their free speech rights by allowing them to read only what was acceptable for children. As Justice Frankfurter said in that case, 'Surely this is to burn the house to roast the pig.'" *Sable* at 126, citing *Butler* at 383.

The proposed FCC rule, as its applies to cable access, does not pass either of the two *Sable* tests. First, it does not "promote a compelling interest," since there is no evidence to indicate that any material even *exists* on cable access from which minors need protection. Second, it does not use the "least restrictive means to further the articulated interest." As the Court already ruled in *Sable*, a 24-hour ban does *not* meet this test.

The Commission is indeed proposing to "burn the house to roast the pig"—yet in this case the pig does not even exist.

Less Restrictive Means Are Available

If the Commission determines that there exists an abundance of indecent programs on access television from which children need protection, then there are ways to accomplish this objective that are less intrusive than the Commission's proposal.

Most simply, the problem could be addressed at the local level. The procedure described above for Boston is one such approach. Other access operations may have their own procedures that work equally well.

Additionally, parents who do not want their children exposed to programming on an access channel could use the parental "local-box," which is required to be provided by all cable operators under the Cable Communications Policy Act of 1984 §624(d)(2)(A), 47 USC §544(d)(2)(A). A lock-box is defined as "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber."

Finally, a subscriber has the option of terminating cable service.

The FCC was given a limited power to regulate "indecency" on radio and television because the broadcast media had established a

"uniquely pervasive presence" and was "uniquely accessible to children," *FCC v. Pacifica Foundation*, 438 U.S. 726 at 748-49 (1978). The Court in *Cruz v. Ferre*, 755 F.2d at 1420, stated that *Pacifica* did *not* apply to cable television, because cable subscribers have many options—including lock boxes and disconnecting service—to control program viewing by children.

Rule's Vagueness Will Lead to Uneven Enforcement

The wording of the proposed rule does not give cable operators, access channel operators, or access producers a clear sense of what programming is allowed and what is not. While the courts have stated that the FCC definition of "indecency" is not vague when applied to broadcasting, they did so in the context of a single enforcement agency—the FCC—which has over the years developed an elaborate series or policy statements and precedents. This is far different from the case of cable access prohibitions, where determination of whether a program is "sexually explicit" would be made by literally thousands of individual cable system managers. Many diverse standards will emerge for prohibited programming, based not only on different corporate philosophies, but on the beliefs and prejudices of each individual general manager.

It is almost certain that *some* over-zealous cable operators will misinterpret the Commission's concept of sexually explicit conduct. The burden will be on public access speakers, who will be required to seek court relief to obtain their First Amendment rights. Most public access producers simply have no funds to hire lawyers, and will lose their Constitutional rights for lack of funds.

What is most disturbing is that the types of programming that cable operators are today most eager to eliminate are precisely the types that the First Amendment was created to protect—programs by gays and others with unpopular lifestyles, rap artists and others with "offensive" manners of speech, and "hate" groups and other extremist political groups.

Regulations Would Impose Unfair Burden on Access Producers and Organizations

The "Initial Regulatory Flexibility Analysis" attached to the Commission's *Notice* notes that the regulations would impose new burdens on cable operators—but fails to mention the far greater burdens that would be imposed on nonprofit access organizations, institutional access producers, and individual access producers.

The Commission suggests only one idea for a process to actually carry out its proposed rule. In paragraph 14 of its *Notice*, the Commission proposes that producers and access organizations would need to "certify" that every program that was cablecast did *not* contain material prohibited under the Commission rules. Although not stated by the Commission, the certification would apparently be submitted to the cable operator, who would apparently have the right to intercept and black-out any programs that were not so certified. In order to make this certification, independent nonprofit organizations that operate access channels would need to pre-screen all tapes prior to cablecast. In Boston, we would need to allocate staff time to view and evaluate each of the 1,326 individual access programs we cablecast per year, and would need to file a certification with the cable operator for each of them. This imposes a huge new burden of staff work and paperwork on organizations such as ours, which, by their very nature, are already grossly understaffed and overworked.

Furthermore, if the necessary paperwork were not filed for a particular program in a timely fashion, the cable operator might decide to delete that program from cablecast. There are very few, if any, access programs that actually contain material prohibited by the proposed rule. For every program that the cable operator takes off the air for reasons of program content, a far greater number will be taken off for failure to file necessary paperwork.

What will happen to live programming, such as call-in programs, political debates, or coverage of city council meetings? Since the cable operator can never be certain what live programming will contain, will all live programming be banned? Such a blanket prohibition seems a case of prior restraint.

It would be ironic if one of the final actions of the Reagan-Bush FCC—a Commission dedicated to removing unnecessary government regulations—would be to impose a burdensome, vague, and overbroad regulation that addresses a problem that does not exist.

Recommendations

The Commission should rewrite its proposed rule to eliminate the category of "sexually explicit" programming, since that category *must* be interpreted to mean "obscene" programming.

Individual access producers should have the responsibility of determining whether their programming is obscene or promotes illegal activity, but should *not* be required to complete unnecessary paperwork in cases where programs are acceptable.

Respectfully submitted,

/s/

Martin Kessel, Clerk
Boston Community Access
and Programming Foundation
8 Park Plaza, Suite 2240
Boston, Massachusetts 02116

December 4, 1992

FCC Caption Omitted

COMMENTS OF
Roxie Lee Cole, Citizen

Roxie Lee Cole submits these comments in response to the above captioned proceeding and in support of the comments filed in this proceeding by the Alliance for Community Media, Alliance for Communications Democracy, American Civil Liberties Union and the People for the American Way.

In particular, Roxie Lee Cole agrees that the provisions of Sections 10(c) and 10(d) will be unconstitutional, however they are implemented. However, assuming that the Commission decides to adopt rules to implement either Section 10(c) or 10(d):

a) The rules should be specific and as narrowly drawn as possible, and must contain limitations that prevent cable operators from hampering use of access channels by those who wish to produce live or cablecast taped programming under the guise of applying the rules. The public access operation I was involved with for over thirteen (13) years did live programing of community events that ranged from professional entertainers to the very inexperienced performer. We have live discussions that ranged from very serious health problems to neighborhood street widenings — all with no problem nor need for censorship.

b) The 1984 Cable Act limited much of the support access centers had been receiving from cable companies previously. The access center resources are very limited and the FCC rules should make it clear that any actions taken by an operator under Section 10 must be undertaken at the operator's own expense. The 1992 Cable Act was intended to cut cost to the consumer; however, these new rules will in fact increase the consumer bill.

c) More than 100 hours are video and text programming are cablecast each week on the access channel in my community. The majority of the programming is produced by volunteers, and

experience shows that it must be as easy as possible for these volunteers to use. Many neighborhood meetings are done with a single camera and taped and run gavel to gavel. Any rules must recognize that any roadbloacks that are placed in the way for production will result in a reduction in speech.

During my 13 years of experience, many times the cable operator and/or City representatives would have limited speech of some citizens if they could have legally. I am greatly concerned for the many citizens who now freely speak will lose this right because of the proposed rule changes.

Respectfully submitted

/s/
Roxie Lee Cole
1145 Bishop Drive, Apt F
Dayton, Ohio - 45449

December 7, 1992

FCC Caption Omitted

COMMENTS OF
Columbus Community Cable Access, Inc. (ACTV 21)

Columbus Community Cable Access (ACTV 21) submits these comments in response to the above captioned proceeding and in support of the comments filed in this proceeding by the Alliance for Community Media, Alliance for Communications Democracy, American Civil Liberties Union and the People for the American Way.

In particular, ACTV 21 agrees that the provisions of Sections 10(c) and 10(d) will be unconstitutional, however they are implemented. However, assuming that the Commission decides to adopt rules to implement either Section 10(c) or 10(d):

a. The rules should be specific and as narrowly drawn as possible, and must contain limitations that prevent cable operators from hampering use of access channels by those who wish to produce live or cablecast taped programming under the guise of applying the rules.

b. Access centers have very limited resources. It could cost as much as $35,000.00 per year to implement the Commission's rules for the 5,824 hours of programming which is transmitted yearly on the public access channel alone. There are, also, an educational access channel and a government access channel in Columbus, each with an equivalent number of annual hours of programming. The FCC rules should make it clear that any actions taken by an operator under Section 10 must be undertaken at the operator's own expense.

c. Approximately 112 hours of video and text programming are cablecast each week on the public access channel in our community. Much of the programming is produced by volunteers, and experience shows that it must be as easy as possible for these volunteers to use the access channel. Any rules must recognize that

any roadblocks that are placed in the way of production will result in a reduction in speech.

ACTV 21 is a nonprofit organization which operates the public access channel serving more than 225,000 cable subscribers in Franklin County, Ohio. ACTV is funded, in part, through the 3% franchise fee from the City of Columbus.

The services provided by ACTV 21 include video training, equipment and facility usage, program scheduling and promotion, and a volunteer corps. The public access channel is operated as a public forum on a first-come, first-served basis. During the last eight years, ACTV 21 has trained 5,514 local citizens in video production. Those individuals, community organizations and nonprofit organizations have produced 14,892 original programs. The community volunteers have put in nearly 30,000 hours of volunteer work to assist other citizens in speaking on the public access channel.

More than 150 community organizations, nonprofits and churches used ACTV's services in 1991 alone. These organizations represent a variety of local interests such as: The John Birch Society, The Columbus Urban League, The Afro-American Center, Hispanic Alliance of Central Ohio, National Organization for Women, The Boy Scouts, United Way of Franklin County, Ohio Special Olympics, the Columbus Area Chamber of Commerce, BalletMet and the Native American Indian Center.

Any rules which the Commission may adopt must consider the affect of those rules on the current and potential speakers on public access channels who, often, represent unique and underrepresented points of view in our democracy.

Respectfully Submitted,

/s/
Carl Kucharski, Executive Director
Columbus Community Cable Access, Inc. (ACTV 21)
394 Oak Street
Columbus, Ohio 43215 DATE: December 7, 1992

Cover Omitted

FCC Caption Omitted

COMMENTS OF THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

The Community Antenna Television Association, Inc, ("CATA"), is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 60 million cable television subscribers. CATA files these "Comments" on behalf of its members who will be directly affected by the Commission's action.

INTRODUCTION

This proceeding is in response to the mandate of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), that the Commission adopt rules and regulations implementing the provisions of that section. Essentially, Section 10 is intended to restrict the availability of programming deemed to be indecent or obscene on cable television access channels. First, it permits cable operators to voluntarily prohibit indecent programming on leased channels on their systems. Second, it requires the Commission to adopt rules that will limit access by children to indecent programming on leased channels by requiring operators to place all indecent programming on a single channel whose reception is blocked except upon a written request for it by the subscriber. Third, it permits operators to prohibit the use of public, educational, and government access channels ("PEG channels") for programming that contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, Section 10 removes the operator's

statutory immunity from liability for obscene material on any access channel.

CATA submits that the provisions of Section 10 of the Cable Act are both unconstitutional and from a practical viewpoint, unworkable. Nevertheless, we understand that the Commission must attempt to carry out its mandate and we offer comments of a constructive nature designed to help the Commission make the best of a bad predicament.

I. THE INDECENCY AND OBSCENITY PROVISIONS ARE UNCONSTITUTIONAL AND UNWORKABLE

CATA would be more than remiss if it did not preface its "Comments" by firmly asserting that the provisions of Section 10 of the Cable Act are an unconstitutional infringement on the rights of cable operators, their subscribers and access programmers. We will not go through the legal rationale supporting our allegation in this proceeding because it already is well stated in the court challenge to the Cable Act filed by Time Warner (*Time Warner Entertainment Company v. FCC*) in U.S. District Court, where the issue will be decided. Suffice it to say that these provisions restrict the editorial control over the content and packaging of the cable operator's product and constitute a taking of the operator's property without just compensation in violation of the Constitution. The provisions of Section 10 put cable operators in the untenable position of requiring them to do what the government cannot do by acting as censors of programming. We will await the outcome of the Time Warner challenge to settle this issue.

From a more practical point of view, especially for smaller cable systems, which constitute a significant portion of CATA's membership, the indecency and obscenity provisions are unworkable. As proposed, the rules for both leased access and PEG access channels put the burden of determining whether a program violates the statute on the operator with respect to systems that choose to adopt a policy restricting the specified "indecent" or "illegal" programming respectfully. This virtually eliminates any live access programming as operators concerned about their liability will need to review each program before allowing it on the access channel.

Moreover, the provisions will require an inordinate commitment of manpower to review all access programming. It is the system operator who must review every program before it is carried on a leased access channel to determine whether it is "indecent," and every program before it is carried on a PEG access channel to determine whether it contains "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Smaller systems will be particularly hard hit because of their limited personnel. It is not unusual for these systems to have a small staff performing a variety of duties often in a number of communities, at one time. The end result we suggest, is a disincentive for operators to adopt policies restricting indecent programming on leased and PEG access channels.

Other practical problems exist with respect to the requirement that all indecent programming on leased access channels be put on a single, "blocked" channel. What happens if the channel becomes filled? How many additional channels must the operator make available? If none, which programmer's programs are to be carried? And what if the programs certified by the programmer as "indecent" really are not, but instead constitute an effort by an individual or group to prevent the carriage of any "indecent" programming by occupying all the time on the only channel available for that purpose?

The numerous constitutional and practical concerns serve to underscore the necessity of leaving control of access channels in the hands of the cable operator.

II. SUGGESTIONS FOR MAKING THE REGULATORY SCHEME MORE MANAGEABLE

CATA recognizes that the Commission is required to implement the provisions of Section 10 of the Cable Act despite their unconstitutional and unwieldy nature. Therefore, it offers the following constructive suggestions that should help make the regulatory scheme more manageable.

A. Operators should be given a "safety zone" within which they will not be held liable for the carriage of indecent or obscene programming.

CATA suggests that the model used for the single blocked channel, i.e., where the burden is on the programmer to notify the operator when a program is deemed to be indecent, be extended to cover other leased and PEG channels in situations where the operator has adopted a restrictive policy as contemplated by the statute. If an operator chooses to adopt a restrictive policy, he should be allowed to require and rely upon certifications from programmers that their programs do not violate the policy. If the operator adopts and follows an established procedure of requiring certifications from programmers, he will fall within a "safety zone" protecting him from liability for carriage of indecent programs on the leased channels or the prohibited programming on the PEG channels. The certifications would demonstrate compliance by the operator with the restrictive policy.

Using this approach, the Commission will protect the operator from the unintended situation where he is more vulnerable to liability for having adopted a policy against carriage of indecent or "illegal" programming than he if had not adopted one. The liability should be the same in both situations, If an operator adopts a policy to prohibit all indecent programming on leased channels for instance, as is permitted under the proposed regulations, he assumes liability for any indecent programming that is carried. On the other hand, operators who choose not to adopt a restrictive policy for leased access channels and instead provide only the single blocked channel, escape liability because they are permitted to rely solely on the word of the programmer with regard to whether a program is indecent. The Cable Act places the burden on the programmer who must tell the operator which programs are indecent.

CATA suggests that the same model be used in determining liability for carriage of obscene programming as well. If the operator can demonstrate an established procedure of requiring certifications that programming is not obscene, he should be entitled to the protection of the "safe zone" and not be held liable. At the very least, it should entitle the operator to a presumption that he did

not have the requisite element of intent to be liable for carriage of obscene programming.

B. "Indecency" should be defined in the context of cable television.

Access to programming on cable television is unique and distinguishable from other media. Cable only delivers programming selected by the subscriber and only upon request and payment of a monthly fee. Even after delivery the subscriber continues to maintain a high degree of control over the availability of the programming. Lockboxes may be secured (and in fact, must be provided by the operator upon request) that enable subscribers to control program viewing. And the newly created leased access channel of "indecent" programming will be "blocked" and available only upon written request from the subscriber.

Cable programming is not omnipresent like a television or radio signal. It is not likely to be stumbled upon by unwary viewers. It must be invited into the subscriber's home and specific programs as well as whole channels of programs, can be specifically uninvited. Thus, the term "indecent" should be defined narrowly when used in the context of programming on cable television systems.

C. Costs incurred in complying with these provisions must be accounted for in determining the system's basic service rates.

Section 3 of the Cable Act sets out requirements that will be used for determining reasonable and therefore, lawful rates to be charged for basic cable service. That section specifically provides that the rates must account,for among other things, the system's costs and PEG obligations. The Commission should make clear both in this proceeding and in its forthcoming one adopting rate regulation requirements, that costs incurred by system operators in complying with the indecency and obscenity provisions of Section 10 are to be accounted for in setting the basic service rate.

As we noted above, the new requirements will impose burdensome administrative obligations on many systems necessitating employment of additional personnel as they may be required to pre-screen all access programming before allowing it to

be carried. Systems that choose to carry indecent leased access programming will have the expense of purchasing and installing "blocking" equipment as well as the administrative cost of tracking subscriber requests for the channel. The Commission should make clear that these costs are to be accounted for in determining reasonable basic service rates.

D. Cable operators need at least 60 days notice that programming will be "indecent."

The provisions of Section 10 require suppliers of leased access programming to notify the cable operator when a program is indecent and therefore required to be carried on the designated single blocked channel. A period of at least 60 days is essential.

Ample lead time is needed to collect, prepare and disseminate information about the time and channel location of programming to be carried on the system. Usually this is done through the preparation and distribution of printed program guides, bill stuffers and other publications such as newspapers and their supplements where a 60 day turnaround time is commonly needed. In addition, both administrative and technical processes are required for shifting and inserting programming among channels on the system. These are not always simple, "throw the switch" processes especially for smaller less technically sophisticated systems where they will have to be performed "by hand" among other duties by existing personnel.

CONCLUSION

The Community Antenna Television Association, Inc., believes that the indecency and obscenity provisions of Section 10 of the Cable Act not only are unconstitutional, but also unworkable. To the degree they are implemented, following legal challenge, they must be designed to be sensitive to the various difficulties, costs and jeopardy they impose on system operators, and particularly smaller

operators. We offer the above proposals as constructive suggestions for making the best of a bad situation.

Respectfully submitted,

THE COMMUNITY ANTENNA TELEVISION ASSOCIATION, INC.

by: /s/
Stephen R. Effros
President

by: /s/
James H. Ewalt
Executive Vice President

Community Antenna Television
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December 7, 1992

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COMMENTS OF CONTINENTAL CABLEVISION, INC.

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SUMMARY

Continental Cablevision, Inc. ("Continental") submits these comments to assist the Commission in its effort to implement Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("Act"). We raise three primary points.

First, in adopting rules to permit cable operators to prohibit obscene and indecent programming on public, educational, or governmental ("PEG") and leased access channels, the Commission must balance the cable operator's potential liability for obscene programs against the desire to minimize editorial intrusion into PEG and leased access channels. To this end, the Commission should permit cable operators to rely on certifications by programmers and should further provide that such reliance constitutes an affirmative defense to liability. If the Commission does not provide such a defense, cable operators must be permitted to make their own determination regarding the possible obscene nature of programs carried on leased and PEG channels.

Second, the Commission should clarify that all state and local franchise authority regulations, as well as specific franchise agreement provisions, that are inconsistent with the Act and the implementing regulations are preempted.

Third, when structuring the single channel requirement for leased access channels, the Commission must adopt regulations that will preserve the local cable operator's choice to prohibit or restrict indecent programming. If the regulations are unreasonable, unduly

cumbersome or costly, the result will be a *de facto* ban on such programming in contravention of congressional intent and constitutional requirements. In particular, the Commission should adopt rules that (1) permit cable operators to fully recover the costs of complying with the single channel requirement, (2) define single channel in a manner that maximizes efficient use of channel capacity, by requiring indecent programs to be aggregated together and scrambled on a single channel but permitting the remainder of the channel to be used for non-indecent and non-scrambled leased access programs, (3) delay implementation of the single channel requirement for 120 days so that cable operators have sufficient lead time to comply with the regulations, (4) require a 45-day notification requirement by leased access program providers of indecent programs to allow operator compliance with the single channel requirement, and (5) require a 30-day advance written notice of a subscriber's desire to change access to indecent programming.

FCC Caption Omitted

COMMENTS OF CONTINENTAL CABLEVISION, INC.

Pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM"), Continental Cablevision, Inc. ("Continental") submits these comments on the proposed regulations implementing the provisions of the Cable Television Consumer Protection and Competition Act of 1992 ("Act") relating to indecent and obscene programming.

INTRODUCTION

Continental, founded in 1963, is the third largest multiple cable system operator and the largest privately owned cable company in the United States. It serves nearly 2.9 million basic subscribers in 600 communities in 16 states, or roughly 5.5% of the nation's cable television households. Public, educational, or governmental access ("PEG") channels are utilized in many of the communities

Continental serves. Leased access channels are also available for commercial use.

Continental operates in a decentralized manner, permitting its operating regions considerable discretion and autonomy in operating their systems and determining how best to serve their customers. To that end, Continental believes its cable systems should, consistent with the letter and spirit of the Act, retain the option of adopting policies prohibiting indecent programs on leased access or PEG channels or restricting the dissemination of such programs consistent with the statutory and regulatory restrictions. In order to preserve this choice for its systems, Continental submits these comments to assist the Commission in its effort to implement Section 10 of the Act in a manner that will avoid unnecessary logistical and practical problems for operators and subscribers. Adoption of rules that recognize these problems could help prevent transforming this provision into a *de facto* ban on indecent programs.

Before discussing these practical problems, we address two threshold issues in these comments. First, because of cable operators' potential liability for obscene programming on PEG and leased access channels, already in effect as of December 4, 1992, we urge the Commission to adopt a regulatory scheme that minimizes cable operators' editorial intrusion in access programming so long as their liability is correspondingly minimized. Second, we ask the Commission to clarify that all inconsistent franchise agreement provisions and local regulations are preempted.

I. THE COMMISSION SHOULD ADOPT RULES PERMITTING CABLE OPERATORS TO PROHIBIT CERTAIN TYPES OF PROGRAMMING IN A MANNER THAT MINIMIZES THE OPERATOR'S EDITORIAL INTRUSION AND, CORREPONDINGLY, ITS RISK OF LIABILITY

The Act directs the Commission to adopt regulations within 180 days of passage of the Act enabling cable operators to prohibit the use of any PEG channel for programming that contains "obscene material, sexually explicit conduct, or material soliciting or

promoting unlawful conduct."[1] Within 60 days of passage of the Act (*i.e.*, as of December 4), cable operators are subject to liability for carriage of obscene materials on the PEG channels.[2] In the NPRM, the Commission seeks comment on how cable operators can categories of programming on PEG channels and on additional issues the Commission should consider.[3]

There are a number of issues the Commission should consider. First, the Commission should clarify that the Act permits operators to prohibit some, but not all, of the types of programs listed in Section 10(c) of the Act. Nothing in the language of the Act, for example, prevents an operator from excluding only a subset of the broad categories included in Section 10(c) from its PEG channels.

Second, Continental views as essential the Commission's suggestion that cable operators should be permitted to require certifications from PEG programmers that no materials falling into any of the statutory objectionable categories will be presented on

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[1] The Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10(c), 106 Stat. 1460, 1486 (1992) (to be codified as amended at 47 U.S.C. § 532) (hereinafter "Act").

[2] As the Commission noted in its NPRM, the amendment to Section 638 of the Act, which eliminates cable operators' immunity for leased access and PEG channels, is self-implementing and therefore effective December 4, 1992. NPRM at ¶ 2. Until such time as the Commission adopts rules permitting cable operators to prohibit obscene programs from their PEG channels, therefore, cable operators are subject to liability for obscene programming on PEG channels without any corresponding authority to exclude such programming from the PEG channels. This raises substantial constitutional and operational concerns for operators. Notwithstanding the above, cable programmers may already be found criminally liable for transmitting obscene material under 47 U.S.C. § 558.

[3] Lest the Commission think that sexually explicit programming on PEG channels is never an issue, we note by way of example that public access programs on one Continental system have included a program in which an access user, frontally nude, urinated on a photograph of the President of the United States and another concerning safe sex that involved a graphic 45 minute demonstration of how to use a condom.

the PEG channels.[4] Certification would minimize both the operator's editorial intrusion and operational burden. But these certifications can be relied on by the operator only if the Commission also makes clear that a cable operator who relies on such a certification has an affirmative defense to liability if material is later found to fall within a prohibited category, notwithstanding the programmer's prior certification to the contrary.[5]

If the Commission does not provide for programmer certification and permit those certifications to be an affirmative defense to liability, the cable operator must be permitted to (1) make its own determination, notwithstanding any certification, that material is obscene and should be excluded, (2) word its certification request in whatever form it desires — *e.g.*, all sexually explicit material, and (3) be held harmless for decisions to exclude material the operator reasonably believes to be obscene. If the cable operator is going to be held liable — potentially criminally liable — for obscene programming on the PEG channels even if a programmer certifies there is no such programming, then the operator must be afforded the discretion to exclude material that the operator reasonably believes to be obscene. And the operator must be permitted to ask for certification regarding a broader category of programming than obscenity — "sexually explicit" material, for

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[4] In the NPRM, the Commission states that certification by "users or operators" could be sought. NPRM at ¶ 14. Continental assumes the Commission intended to mean programmers and program providers.

[5] Such a procedure would be consistent with the Commission's decision involving obscene or indecent programming carried on multipoint distribution service (MDS) systems, in which the Commission concluded that "there must be a high degree of involvement or actual notice of an illegal use and failure to take steps to prevent such transmissions before any liability is likely to attach." *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, Memorandum Opinion, Declaratory Ruling and Order, Docket No. 83-989, 2 FCC Rcd. 2819, 2820 (1987).

example — so that the operator can review the sexually explicit programs to decide if it reasonably believes any of it is obscene.[6]

Finally, the Commission should extend its rules governing a cable operator's ability to prohibit these kinds of programs on leased access channels. Specifically, cable operators should be expressly permitted to exclude from leased access channels obscene programs only and, if they so choose, to rely on certifications (with a defense against liability) to enforce such a policy.

II. THE COMMISSION SHOULD CLARIFY THAT ALL STATUTES OR REGULATIONS OF ANY STATE, FRANCHISING AUTHORITY OR OTHER LOCAL GOVERNING BODY THAT ARE INCONSISTENT WITH THE ACT AND COMMISSION'S REGULATIONS ARE PREEMPTED

Many state and local franchise authority regulations, as well as specific franchise agreement provisions, will be directly affected by the substantial alterations in the Act and the FCC's rules on indecent and obscene cable television programming on leased access and PEG channels. Many existing franchise agreements, for example, prohibit cable companies from exercising editorial control over the content of programming on these channels.[7] Because those franchise provisions are inconsistent with the provisions in the Act authorizing cable operators to prohibit or restrict certain types of programming on PEG and leased access channels, the Commission should clarify in its order that all inconsistent provisions in franchise agreements and state or local regulations are preempted by the new federal statutory provisions and implementing

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[6] Although, as the Commission notes, these disputes involving PEG channels are frequently resolved at the local level, NPRM at ¶ 14, it is the Commission that has been directed to establish the regulatory framework.

[7] The franchise agreement between Continental's Greater Dayton (Ohio) system and the Miami (Ohio) Valley cable Council provides, for example, that the cable operator "shall exercise no control over program content on any of the access channels."

regulations, pursuant to the Section 656 of the Communications Act, 47 U.S.C. § 556.

There is a related issue the Commission should clarify. Pursuant to the enabling regulations of the local franchising authority (or in franchise agreements), many cable operators have entered into arrangements with independent access corporations whereby the operators sign over editorial control for programming on cable channels.[8] Frequently, the access corporations transmit live programs directly from their studios onto dedicated PEG channels. Many access agreements contain a provision indemnifying the cable operator for liability stemming from the actions of the corporation. These indemnification provisions, however, would not appear to (nor could they) protect the operator from criminal liability for airing obscene material under the new liability provisions of the Act. Thus, the Commission should also provide that any contractual arrangements with independent access corporations, to the extent these provisions limit a cable operator's control over obscene or indecent programming, are also preempted by the Act.

III. THE COMMISSION MUST ADOPT REASONABLE REGULATIONS RESTRICTING INDECENT PROGRAMMING ON LEASED ACCESS CHANNELS OR THE RESULT WILL BE AN UNCONSTITUTIONAL *DE FACTO* BAN ON ALL INDECENT PROGRAMMING

The Act grants cable operators the choice of either: (1) prohibiting all indecent programming on leased access channels, or (2) restricting indecent (but not obscene) programming, pursuant to the regulations adopted by the commission, to a single leased channel and restricting access to the indecent programming unless

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[8] The franchise agreement between Continental Cablevision of Brockton, Inc, and the Brockton, Massachusetts, nonprofit access corporation, for example, provides that the access corporation "shall have sole responsibility for determining access and scheduling of time on the allocated channels."

the subscriber requests access in writing.[9] Continental urges the Commission to adopt regulations that will in fact (not just in theory) preserve the local cable operator's choice to either prohibit or restrict such programming. If the Commission adopts regulations that are unreasonable, unduly cumbersome or costly, the result will be a *de facto* ban, which would be contrary to Congress' intent[10] and a clear violation of the Constitution.[11]

The Commission should, therefore, adopt rules that (1) permit cable operators to fully recover the costs of complying with the single channel requirement, (2) define single channel in a manner that maximizes efficient channel usage, (3) delay implementation of the single channel requirement for 120 days so that cable operators have sufficient lead time to equip themselves and their customers so that they can comply with the requirements, (4) provide a reasonable notification period by program producers to allow cable operators time to restrict access to indecent programs, and (5) require a 30-day advance, written notice of a subscriber's desire to change access to indecent programming.

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[9] Act at § 10.

[10] *See* 138 Cong. Rec. S646,649 (daily ed. January 30, 1992). In discussing the provision of the Act permitting cable operators to prohibit indecent programming on leased access channels, the sponsor, Senator Jesse Helms, stated: "The pending amendment merely gives cable operators the legal right to make that decision. The amendment does not require cable operators to do anything. Therefore, let me say it again, this amendment does not in any way propose censorship." *Id.* at § 646.

[11] *See Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115 (1989) (statutory ban on indecent telephone messages violates the First Amendment); *Action for Children's Television v. Federal Communications Commission*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1281 (1992) (ban on all radio and television broadcasts of indecent material violates the First Amendment).

A. The Commission Must Permit Cable Operators To Recover The Full Cost Of Complying With The Act

Restricting indecent programming on leased access channels to a single channel and scrambling such programming to prevent reception unless the subscriber has affirmatively requested access will impose significant costs on the cable operator. If operators are not permitted to recover these costs in full, they will be forced, as a practical matter, to adopt instead a policy prohibiting all such programming. The single channel requirement would thereby be converted into a *de facto* ban. Although the Commission does not seek comment on the magnitude — or recovery — of costs in this proceeding, these costs must be recoverable. We therefore describe these costs here, while recognizing that they may need to be considered in the ratemaking proceeding as well.[12]

The costs the cable operator will incur to comply with the single channel requirement are substantial. For example, if a system carries any indecent leased access programming, the operator will be required to purchase an additional scrambler at each head end and install positive traps for each subscriber wishing to receive the scrambled leased access channel containing indecent programming. Aside from the actual costs of the scramblers and traps, there are the additional costs of installation, maintenance, inventory, and service. Perhaps the greatest cost will result from the possible need to provide a separate channel dedicated solely to indecent leased access programming. This change would in many cases also have a domino effect on other channels, requiring a number of other channel realignments. In addition to all of the costs related to subscriber notification, channel realignment could require the replacement (or reprogramming) of the tens of thousands of traps currently in place in non-addressable systems.

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[12] Additionally, in the ratemaking proceeding the Commission should consider the costs of prohibiting indecent and obscene programming (on both leased access and PEG channels), including the costs of monitoring programming and/or obtaining certifications from programmers.

B. The Commission Should Define "Single Channel" In A Manner That Maximizes Efficient Use Of Channel Capacity

The Act clearly mandates the Commission to require a cable operator to aggregate all indecent leased access programs on a "single channel."[13] The Act does not, however, mandate that the Commission require the rest of that "single channel" be warehoused for indecent programming. The costs described above that would result from warehousing an entire channel could be mitigated if the Commission defines "single channel" in a manner that requires indecent programs to be carried (and scrambled) on a single channel but permits the operator to use the remainder of the channel for non-indecent (and non-scrambled) leased access programs. This is a far more reasonable solution that still meets the mandate of protecting children.

Most of Continental's systems have few, if any, leased access program hours per year — let alone per week or per day. If those systems were required to set aside an entire channel in order to carry a few hours of indecent programming each year, no one could afford to choose the single channel option and incur the associated disruptions and costs. Further, with channel space at a premium, cable operators cannot afford to devote two channels to leased access programming that would otherwise fit on a single leased access channel. Despite the proliferation of recent press articles concerning future promises of digital compression and other technologies, today's reality is that channel capacity for most cable systems is extremely limited and in high demand. Without the flexibility to scramble part of a "single channel," cable systems either would be forced to ban such programs or would encounter overwhelming economic costs and greatly disserve their subscribers, who would otherwise be able to receive an additional program service.

The Commission can mitigate the costs and burdens of restricting access by permitting the operator to aggregate and

[13] Act at 10(b).

scramble all indecent leased access programming on a single channel, while still providing non-scrambled leased access programming the rest of the day on that same channel. Nothing in the Act or legislative history prevents the Commission from defining "single channel" to permit this flexibility. Indeed, to define it in a way that would require unnecessarily inefficient use of channel capacity would essentially ensure that cable operators would have no choice but to opt for a prohibition, thereby converting the option into a *de facto* ban in direct contravention of congressional intent and constitutional mandates.

C. The Commission Should Delay The Effective Date Of The Rules Relating To The Single Channel Requirement To Permit Implementation

In light of the technical changes that will need to be made, both at the cable head end to scramble the signal and at the customers' premises to replace and provide properly programmed traps, cable operators must be afforded sufficient lead time to implement the single channel requirement. Continental requests that the Commission exercise its authority under the Act and delay the effective date of the regulations related to the single leased access channel for 120 days after the final regulations are adopted.[14] During this time, the cable operators will be able to purchase and install the necessary equipment in order to comply with the regulations, as well as to engage in consumer education to inform subscribers of the changes in cable operations.

Given the enormous changes that must be made to cable systems to implement the single channel requirement, a 120-day implementation period should be provided. Continental Cablevision of Greater Dayton (Ohio) is a typical non-addressable system. In order to meet the single channel requirement, the Greater Dayton system would first have to identify a separate channel for indecent

[14] Unlike other provisions of the Act, the provisions governing single access channel restrictions are not self-executing. While Congress provided that the Commission must enact regulations within 120 days of passage of the Act, it did not specify the date by which time the regulations must become effective.

leased access programming, which would also likely entail channel repositioning. It would then need to scramble that channel, order the necessary traps, and then deploy service trucks and service technicians to install those positive traps in all homes in which subscribers affirmatively requested the programming.

Even in addressable systems, a 120-day implementation period is needed. Because virtually no currently installed addressable cable converter scrambles the audio portion of the television signal, addressable systems would still need to purchase a jamming type of scrambler and install positive traps. Indeed, in some fashion the burden in addressable systems would be greater. Having invested in advanced addressable technology precisely to avoid the expense of buying and physically installing traps, systems with addressable technology would now have to purchase test equipment and traps solely for the purpose of scrambling indecent leased access programming.

The operator's ability to take these implementation steps, in both addressable and non-addressable systems, within the 120-day period will depend in large part on factors beyond its control, *e.g.*, the volume of subscribers who want to receive the indecent programs and the availability of scramblers and traps for purchase. Given these uncertainties, Continental urges the Commission to adopt a 120-day effective date, with provisions for a waiver upon a showing of good cause that the implementation period, on a case-by-case basis, must be extended.

Without such a lead time, cable operators will be unable to comply with the single channel requirement and will have no choice but to prohibit all indecent programs. The result, in violation of the Act and the Constitution, would be a *de facto* ban.

D. The Commission Should Impose A 45-Day Notification Requirement By Leased Access Programmers With Indecent Programming

Under the Act, programmers are required to inform cable operators if the material to be presented on the leased channel contains indecent material.[15] The Commission requests comment on "what would be a reasonable time frame for the required notification by a program provider to the cable operator. . . ."[16] In the proposed regulations, however, the Commission, without any explanation, proposes seven days as a "reasonable timeframe" for the requisite notice to the cable operator.[17]

Quite simply, seven days is not a reasonable or sufficient amount of time for the cable operators to receive notification of indecent programming and arrange to move such programming to a single channel and scramble it pursuant to a programmer's notification. For example, even if a program is certified as indecent, operators may still need to review it to be certain there is no obscene material. *See supra* at 4-6. Furthermore, in certain communities such as University City, Missouri, Continental provides government authorities with a monthly guide to the next month's leased and PEG access programming. This guide is published as much as one month prior to some access programming, requiring substantial advance notice from programmers.

The Commission also asks "whether such notification should be made in writing."[18] Continental urges the Commission to require programmers to provide such notification in writing to the local cable system. By so doing, there will be less likelihood of miscommunications. Further, in Continental's view it is essential that a cable operator "be held harmless from liability . . . if it does

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[15] Act at § 10(b).

[16] NPRM at ¶ 12.

[17] NPRM at Appendix A, Part 76 2(c).

[18] NPRM at ¶ 12.

not receive any, or timely, notification from a programmer."[19] Any other rule would be grossly unfair in light of the Commission's conclusion that "[u]nder Section 10 it is the program provider, not the cable operator, who must determine if a program is indecent and, hence, must be provided on the blocked channel."[20]

E. The Commission Should Require A 30-Day Advance Written Notice Of A Subscriber's Desire To Change Access To Indecent Programming

A final issue the Commission should address concerns the timing and form of the notice subscribers must give to the cable operator if subscribers wish to change the status of their access to indecent programming on leased access channels. In particular, cable operators must have sufficient time to comply with a subscriber's request to block access to the indecent programming that had previously been transmitted to the subscriber's home pursuant to the subscriber's consent. In the absence of such a rule, an operator could be held liable for transmitting indecent programming in violation of the Commission's rules.

Continental urges the Commission to adopt a rule giving the operating company 30 days to implement a customer's request to change access to indecent programming. During this time period, the operator will be able to install or remove the individual trap from the subscriber's home. Further, the Commission should clarify in its order that cable operators will not be held liable during this 30-day period if a subscriber continues to receive unscrambled indecent programming.

Finally, to protect against fraud and miscommunications, the Commission should permit operators to require that all subscriber requests to change their access to indecent programs be in writing and include the name, address and account number of the subscriber. Such a requirement will help eliminate the possibility that unauthorized people will make fraudulent requests to the cable

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[19] Id.

[20] *Id.* at ¶ 10.

company to unscramble indecent programming at another subscriber's home.

CONCLUSION

For the foregoing reasons, Continental respectfully requests that the Commission implement regulations on indecent and obscene cable programming that (1) provide operators with sufficient power to prohibit obscene programming on PEG and leased access channels in a minimally intrusive manner, (2) preempt inconsistent state and local regulations and franchise agreements, and (3) do not impose onerous cost or procedural burdens, thereby resulting in a *de facto* ban on indecent programming on leased access channels.

Respectfully submitted,

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COMMENTS OF COX CABLE COMMUNICATIONS, A DIVISION OF COX COMMUNICATIONS, INC.

* * *

The Commission must also enact regulations to enable cable operators to prohibit the use of public, educational and governmental ("PEG") channels for any programming that contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct. Finally, Section 10 eliminates an operator's immunity for carrying obscene material on leased or PEG access channels.

Cox submits that the mandatory provisions of Section 10 of the Cable Act are unconstitutional. While this is not a determination that Congress has authorized the Commission to make, the Commission, in implementing this provision, must minimize the unconstitutional impact of this provision on constitutionally protected speech. To do so, the Commission's rules must insulate cable operators from liability for not censoring protected speech.

The Commission should also recognize that cable operators need flexibility in complying with this law.

* * *

Through Section 10, Congress has impermissibly "deputized" cable operators to act as censors of constitutionally protected speech. Placing the initial notice requirement on programmers does not cure the constitutional infirmity of this provision. The Commission's rules must take the next step and limit an operator's control obligations solely to reviewing and acting in good faith on a programmer's certification and not requiring an operator to review the programming itself. Once an operator performs these obligations, it cannot face even limited liability for failing to shift the programming to the blocked access channel.

* * *

Otherwise, operators may be unwilling to carry constitutionally protected speech. In keeping with the permissive nature of the PEG provision, operators must be given the flexibility to determine the extent to which they will monitor programming for such material. A rigid definition of "material soliciting or promoting unlawful conduct" is probably impossible to achieve in this context.[11]

Conclusion

The Commission's primary obligation in this rulemaking is to minimize the unconstitutional elements of Section 10 by immunizing cable operators from liability if they comply in good faith with its provisions. While Congress has impermissibly imposed censorship duties on cable operators, the Commission must minimize the chilling effect of these provisions. Cable operators simply cannot be required by the government to investigate, evaluate and control constitutionally protected speech.

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[11] However, in the interest of reducing uncertainty in the area of constitutionally protected speech, the Commission should clarify that it interprets "sexually explicit conduct" to have the same meaning as "indecent program material." Senate drafters of this provision appear to have intended the phrases to be synonymous. *NPRM* at 6, n.11.

* * *

Respectfully submitted,

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By /s/
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December 7, 1992

FCC Caption Omitted

**COMMENTS OF
DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.
ON NOTICE OF PROPOSED RULE MAKING**

Denver Area Educational Telecommunications Consortium, Inc. ("DAETC") hereby submits the following comments regarding the policies and conditions proposed in the above-captioned proceeding.

I. Background on DAETC and its Program Service, The 90's Channel

Description of The 90's Channel

DAETC began programming leased access channels in late 1989.

DAETC's program service in known as The 90's Channel.[1] Although DAETC is non-profit, as are its cable programming efforts, The 90's Channel carries advertising. Since it is a "basic" program service, cable subscribers do not pay extra to receive the channel.

The 90's Channel carries a wide variety of material, much of it both controversial and otherwise unavailable to its viewers. It transmits documentaries and magazine programs on topics which have included: the Persian Gulf War, environmental contamination, racism, US-Cuba relations, union organizing, the status of recent immigrants, issues of concern to Native Americans, the Palestinian uprising, the US invasion of Panama, the Iran-contra scandal, urban

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[1] Because The 90's Channel is DAETC's chief cable programming effort, herein the terms "The 90's Channel" and "DAETC" will be used essentially interchangeably.

gangs, prison conditions, art censorship, gay rights, prostitution, and AIDS.[2]

Most programs carried on The 90's Channel express opinions in addition to reporting facts. Most of the opinion is liberal. If The 90's Channel were a publication, then, it would have more in common with *The New Republic* than the New York *Times*.

Much of the material shown on The 90's Channel is recorded with portable video cameras in a verite or semi-verite style. The channel has carried more than 20 hours of programming from a source known an CamNet, which is described in several articles attached hereto as Appendix A. As Appendix A shows, critics and observers have often commented on the immediacy, unvarnished quality, and the "realness" of such portable video work.

The 90's Channel delivers its programming to cable systems on videotape, which is played on automated equipment. Generally, there are two fresh hours of programming each week, which are repeated around the clock. The channel's present equipment makes it difficult to run different programs at different times of day, since manual tape changing would be required. The "round the clock" nature of the programming has provoked complaints, since material oriented toward adults runs during daytime hours.[3] The 90's Channel has voluntarily refrained from transmitting certain meritorious programming because we are not yet equipped to run it only during evening hours.

A small but important portion of The 90's Channel's programming deals with sexuality. Such material cannot be extricated from coverage of matters such as gay rights, AIDS, art censorship, and prostitution. Although the channel has never carried a full-length program that dealt with sexuality *per se*, certain

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[2] Originally, the channel's programming consisted of *The 90's* magazine series. However, in 1991 the Public Broadcasting Service acquired all new episodes of *The 90's* on an exclusive basis, and the channel was forced to diversify its program sources.

[3] This material deals with topics which are not readily comprehensible to children, but is in no way "adult" in the sense of pornography.

magazine segments have been about sex. Appendix B to these comments describes a number of program segments dealing with sexuality which The 90's Channel has carried.

As well, the unvarnished quality of certain programming on the channel means that it includes profanity; some common profane terms are of course sexual or excretory in character.

The 90's Channel pre-screens and carefully assesses the programs it carries. Our executives personally respond to viewer comments and complaints. We have had long, heartfelt conversations with viewers who were offended by material we transmitted. Although we carry programming which other networks would exclude, it is not because we have failed to weigh the implications carefully.

DAETC and the Difficult History of its Current Channel Lease

DAETC is a Colorado non-profit corporation formed in 1983. In 1986, DAETC entered into an agreement to lease full-time channels on eight cable systems operated by United Cable Television Corporation ("United").[4] The term of this lease commenced in 1987.

In 1987, when DAETC was prepared to transmit programming pursuant to the channel lease with United, United refused to honor the lease. DAETC subsequently sued United in state court in Colorado, where both entities were headquartered. After a substantial period of litigation, DAETC and United entered into a settlement agreement by which United agreed to provide the leased access channels. The state court judge hearing the case accepted the settlement agreement by court order, and retains supervision of the matter to insure adherence to the terms of settlement.

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[4] Those systems are: Alameda, CA; Scottsdale, AZ; Denver (suburbs), CO; Hacienda Heights and San Fernando Valley, CA (both in Los Angeles County); Vernon, CT; Baltimore, MD; and Oakland County, MI. Today, these cable systems serve over 500,000 subscribers. Pursuant to the channel lease agreement, DAETC's programming is to be carried on the lowest tier of service.

After DAETC began programming the leased access channels, United was merged into United Artists, forming a company known as United Artists Entertainment ("UAE"). UAE was majority owned by Tele-Communications, Inc. ("TCI").

In September, 1990, the management of UAE's East San Fernando Valley system removed all 90's Channel programming from the air because it found the content to be objectionable. This removal was in direct violation of the quondam terms of Section 612 of the Communications Act, which at that time specified that cable operators were to exercise no control over the content of leased access channels. DAETC was forced to hire attorneys and threaten the resumption of litigation before it was able to regain editorial control over its leased channel on the East San Fernando Valley system.

Subsequently, TCI acquired 100% ownership of UAE, and assumed direct control over the systems on which DAETC leases channels.

The manager of at least one TCI system has made it clear that she wants The 90's Channel removed from the air an soon as possible. Several others have expressed concern about the fact that they have received viewer complaints about controversial programs. These managers aver, and DAETC agrees, that viewers are often unaware that the cable company cannot control the content of programs on leased access channels.

In August, 1992, DAETC received a letter from a TCI executive which claimed, erroneously, that the United-DAETC channel lease agreement was to expire on October 31, 1992. As a result, DAETC has filed a motion in Colorado state court seeking a ruling that, *inter alia*, the term of the applicable channel lease agreement will not expire until November 1, 1995, at the earliest.[5] This matter is pending in Colorado state court, and The 90's Channel remains on the air. TCI and DAETC have entered into settlement negotiations, which are continuing.

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[5] In addition, the United-DAETC channel lease provides for certain further renewal rights, at DAETC's option.

DAETC's relationship with United and its successors has been consistently difficult. As well, Congress has found that cable operators have evinced a general pattern of hostility toward channel leasing. For instance, the Senate Report to the Cable Consumer Protection and Competition Act of 1992 ("1992 Act") states:

> For irrefutable evidence of the failure of the leased access provision, one need look no further than the marketplace. Despite widespread instances of dropping of local broadcast stations and refusals to carry competitive program services, there is no evidence that excluded programmers have been successful in gaining access through Section 612 . . .
>
> . . .The cable operator in almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer . . . [6]

II. Background on Indecency-Related Issues Posed by the 1992 Act

The Indecency Standard

Although indecency has been considerably litigated as a legal standard it cannot be applied with unfailing accuracy.[7] With regard to the indecency definition which the Commission proposes in its Notice of Proposed Rule Making ("NPRM") in the above-captioned matter, one has to assess what is "patently" offensive under

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[6] Senate Report 102-92 at p. 30. Footnotes omitted. The first quoted paragraph is an excerpt from the testimony of Preston Padden contained in Senate Report 102-92.

[7] In DAETC's view the indecency provisions of Section 612 of the 1992 Act are unconstitutional. However, since the Commission is required to implement these portions of the statute until they are stayed or overturned — an unknown period of time — DAETC has elected to participate in this proceeding.

"contemporary community standards."[8] By the plain wording of the phrase "contemporary community standards," such standards can change over time. As well, they are likely to vary from community to community. Perhaps more importantly, different individuals in any given community will possess radically different notions of what is or is not patently offensive. Thus, generally without the benefit of quantitative methods, programmers have to determine the balance of opinion in a given locality at a given time with regard to innumerable specific program segments.[9]

Congressionally Mandated Rule Making Issues

The NPRM in the above-captioned proceeding responds to the requirement established by Section 612(j) of the 1992 Act. As noted in the NPRM at pp. 3-4, the Commission in required to adopt a definition of indecency, and to establish procedures for the handling of indecent material on leased access channels, if such material is not voluntarily prohibited by the cable system operator.

Section 612(j) in effect penalizes cable operators for not voluntarily banning indecent material in that they are required to designate a special scrambled channel. Most cable operators today perceive channel capacity to be scarce. DAETC believes very few cable operators will want to set aside an entire channel for indecent material carried by leased access programmers.

Important Issues Raised by Self-Effectuating Portions of the Statute

Two important provisions of the 1992 Act pertaining to indecency are self-effectuating. Both are contained within Section 612(h).

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[8] NPRM at p. 4.

[9] The task facing adjudicators is easier only in that they need examine many fewer programs, and thus can take much more time to study each instance of possible indecency. Under these circumstances, it is possible to undertake more extensive research into what is or is not patently offensive to various groups within a given community. Even with this advantage, the Commission itself on occasion has been forced to anguish over what is indecent; its adjudication of political advertising which contained gruesome images of aborted fetuses provides a recent example.

First, cable operators are authorized "to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner an measured by contemporary community standards." As noted above, operators are in effect penalized for refraining from implementing such a policy, in that they are required to set aside a scrambled channel for indecent programming.

Second, as already quoted above, effective December 4, 1992 cable operators were given the power to refuse to carry a leased access program service, if in the judgment of the cable operator such service is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise unprotected by the Constitution of the United States."[10]

Although these provisions are self-effectuating, DAETC believes that they are the most critical, in that DAETC expects that the vast majority of cable operators will adopt prospective policies and/or ban channels rather than be forced to reserve scrambled channels for indecent programming.

Other Pertinent Provisions of the 1992 Act

Section 612(c)(4)(a)(ii) of the 1992 Act authorizes the Commission to establish reasonable terms and conditions for the use of leased access channels. Section 612(c)(4)(a)(iii) authorize, the Commission to establish procedures for expedited resolution of disputes concerning leased access rates or carriage.

III. Over-broad Application of the Act by Cable Operators

As described above, self-effectuating portions of the 1992 Act delegate to cable operators important powers with regard to

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[10] This provision also allows the operator to carry the service subject to conditions. Unlike the other Section 612(h) provisions herein described, there in no explicit standard of reasonableness required for the removal or attachment of conditions to leased access program services which the cable operator judges to be obscene, indecent, or possessing the other characteristics listed in the statute.

obscenity, indecency, and similar matters as they pertain to leased access.

However, unlike the Commission or the courts, cable operators are not neutral judges of indecency. DAETC's experience is that United and TCI have shown great resistance to the notion of leased access in general, and Congress came to a similar conclusion about the industry as a whole when it drafted the 1992 Act. UAE, and, to an extent, TCI, have been hostile toward controversial programming carried on DAETC's leased access channels. This animus is at least in part understandable, since viewers often believe that the cable company is responsible for programs that offend them.

As of this date, TCI has not supplied DAETC with a written policy pertaining to indecency on leased access channels, despite the fact that the statute authorizes TCI to implement one. DAETC has been given to understand that TCI does plan to adopt a policy an indecency in the future, however.

In the absence of a written policy, DAETC cannot be sure of TCI's stance. However, DAETC has been informed that highly and unnecessarily repressive policies are under consideration in the industry.

Under the contemplated policy described to DAETC by knowledgeable industry personnel, leased access programmers would be required to represent and warrant that their programming is not indecent. If even a single breach of representation and warranty occurs, the offending programmer would be taken off the air permanently, or its channel would be scrambled in the manner described in Section 612(j)(1). If a leased access program provider refuses to provide the required representation and warranty, the penalty would be the same as that for breach.

A policy imposing such draconian consequences for programmer error, if implemented by a cable operator, would go far beyond the intent of the statute to protect children from indecent programming.

In DAETC's estimation, the only certain way to avoid presenting indecency is to eschew not only that which is indecent,

but also that which a hostile cable operator arguably could hold to be indecent in the most conservative locality served. Such an approach will inevitably lead to the blocking of meritorious programming which is not indecent.

Until the indecency provisions of the 1992 Act are enjoined or found to be unconstitutional, the 90's Channel is of course resolved to comply with the law. However, we are adamantly opposed to procedures which force us to self-censor all materials that approach the margins of indecency.

IV. DAETC's Recommendations for Commission Action

As noted in the NPRM, Commission has recognized its obligation to implement the Act in the most constitutionally permissible manner,[11] i.e. the least restrictive manner needed to protect children from indecency.[12]

Self-Effectuating Provisions of the 1992 Act

DAETC believes that, given the Commission's obligation to implement the 1992 Act in the most constitutionally permissible manner, it must establish rules and policies concerning the self-effectuating portions of the 1992 Act. Commission involvement in self-effectuating provisions will prove especially important, because vast majority of cable operators will adopt prospective policies pursuant to Section 612(h), mooting the rules adopted pursuant to Section 612(j). DAETC points out that among the triangle of interested parties — the cable operator, the channel lessee, and the Commission — only the Commission is neutral. The 90's Channel's experience establishes that cable operators cannot be relied upon to be impartial judges of indecency, and that such a state of affairs is natural since their paying subscribers hold them responsible for programming they find offensive.

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[11] NPRM at p. 4.

[12] See *Sable Communications v. FCC*, 109 S. Ct. 2829, 2836 (1989).

At paragraph 11 of the NPRM, the Commission inquires as to whether cable operators can require certifications regarding indecency and/or obscenity from channel lessees.[13]

In these comments, DAETC has described circumstances in which certifications can be used in a highly and unnecessarily repressive manner. If the penalties associated with actual or putative breach of certification are severe, the result will go far beyond protecting children from indecency; rather, the effect will be to chill a wide variety of speech which is not indecent.

DAETC believes that the Commission should permit the use of certifications only under conditions which it proscribes and monitors, including the following:

1) The cable operator must be barred from removing, scrambling, or otherwise harshly penalizing a leased access programmer based on a single instance of indecency in breach of certification, or based on a small number of instances over time;

2) Disputes over the indecency of individual programs or program segments between the cable operator and leased access programmer must be appealable to the Commission, or another neutral adjudicator;

3) If a cable operator wishes to remove, scramble, or otherwise harshly penalize a leased access programmer on the grounds of indecency, it must give advance notice of such a contemplated action to the programmer in writing, and the programmer must have the right to appeal such planned action to the Commission before it takes place.

DAETC believes that the above conditions are appropriate for two reasons. First, as already described, the cable operator cannot be relied upon as a neutral adjudicator of indecency. Secondly, DAETC observes that cable operators remain protected from

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[13] The Commission states: "We assume that cable operators who have a written and published policy of prohibiting indecent material may require such certifications." (NPRM at p. 6.)

liability under Section 638 of the Act for the transmission of indecent programming.

DAETC recognizes that cable operators' statutory immunity under Section 638 has been removed with respect to obscene material, and that obscenity is not constitutionally protected. However, DAETC believes that the above-listed protections should also apply to allegedly obscene material, since the 1992 Act allows operators to adopt policies refusing to transmit any individual program they believe to be obscene — at least until the question of obscenity is adjudicated as to that program. To permit harsher sanctions for breach of certification with regard to obscenity invites operators to abuse their discretion by branding objectionable content obscene rather than indecent.[14]

Further, DAETC believes that because the Commission now has jurisdiction over the rates, terms, and conditions pursuant to which leased access channels are provided, it will inevitably become the forum for disputes between programmers and operators about indecency, obscenity, and related content issues affecting carriage. DAETC believes that the Commission should adopt expedited complaint resolution procedures for such problems, somewhat in the manner it presently does for Section 315 and related political broadcasting disputes.

Finally, DAETC believes that the Commission should clearly state that its rules and policies do not shield a cable operator from civil liability for breach of contract if the operator removes or bars programming that is not obscene or indecent.

Other Provisions of the 1992 Act

In the NPRM, the Commission inquires as to whether, under Section 612(j) of the 1992 Act, a cable operator is powerless to

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[14] There is little reason to believe that such a regime is so lax as to encourage obscenity on leased access channels. Leased access programmers are subject to criminal prosecution for carrying obscene material.

require that indecent programming be carried on a blocked channel if the program provider fails to identify the program as indecent.[15]

DAETC points out that Section 612(j)(1)(A) of the statute is clear that cable operators are required to place all indecent programs *as identified by program providers* on a blocked channel. This provision does not give program providers unbridled discretion, however, or leave operators without recourse. Under Section 612(j)(1)(C) of the 1992 Act, programmers are required to inform cable operators if a program is indecent as defined by Commission regulations. The Commission or the courts have the power to sanction program providers if they fail to comply with the provisions of Section 612(j)(1)(C). As mentioned above, DAETC recommends that the Commission establish expedited complaint procedures regarding indecency, and, pursuant thereto, cable operators would be free to bring such matters to the Commission's attention.

Respectfully submitted,

DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.

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Dated: December 4, 1992

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[15] NPRM at p. 5.

Appendix A

ARTICLES CONCERNING CAMNET

Mark Robichaux, *Camcorders Spark Two Cable Ventures*, WALL STREET JOURNAL, July 30, 1992 at B1

Los Angeles—Cameraman Jay April sinks ankle-deep into a three-story-high compost heap, believed to be the largest in the Western world, and trains his camcorder on the heap's long-haired, bearded owner, who speaks only in rhyme.

Environmental zealot Tim Dundon, better known as Zeke the Sheik from the planet Bleak, is pontificating on the pile:

I mix it like pancake batter
To make the ladder of matter fatter,
But it doesn't matter
Because everybody thinks I'm as mad as a hatter.

At intervals, Zeke breaks into song. A favorite: "I Never Promised You a Rose Garden."

The footage will soon air on Camnet, a five-month-old cable network that shows mini-documentaries shot with camcorders by a cadre of aging video activists and artists. Started by two women from Venice Beach, Calif., Camnet eschews, anchors, reporters and hosts.

Correspondents have taped homeless poets, a skinhead picnic on the Mexican border, a visit to the Nixon Museum, a "Justice for Janitors" rally in Los Angeles and a guided tour of the Barbie doll inventor's prosthetic breast factory. Once Camnet lent a camcorder to Los Angeles gang members, whose woeful footage of life in their neighborhood drew tears from one video editor.

This isn't cute enough to be "America's Funniest Home Videos." And it's a far cry from NBC's "I Witness Videos," which is often grisly. It's *cinema verite* meets *vax populi*, a gentle amateur service from the handheld point of view.

Two-Hour Loop

The stories, some sober and serious, some arcane, air the last two weeks of every month to more than 828,000 homes in 10 cable systems from Los Angeles to Philadelphia. The same two-hour loop airs 12 times a day. "Think of television as food," says Mr. April. "We've been eating the same meat and potatoes served up by the networks since the 1950s. Now people are cooking more exotic dishes at home."

The attitude has drawn a cult-like following of young and old viewers. "They reveal as opposed to preach," says Victor Dinnerstein, a 46-year-old San Fernando Valley resident and Camnet fan. "It's a little off the wall, but it's pure insight."

Camnet is run on a budget not much bigger than the combined savings of cofounders Nancy Cain and Judith Binder. They met while working on "The '90s," a critically acclaimed, populist camcorder-based magazine show now in its fourth and final season on PBS. They like the concept so much that they decided it could work on a much bigger scale.

Ms. Binder had been an independent director with alternative theater troupes in Los Angeles. Ms. Cain and several other Camnet contributors are the same counter-culture video artists who roamed from loft to loft in New York in the late 1960s and early 1970s, watching each other's experimental videos on such topics as the trial of the Chicago Seven and Woodstock. They dubbed themselves the Videofreex and once transmitted homemade programming to a valley in upstate New York that wasn't being served by a broadcast station.

Camnet personnel still haven't exactly joined the Establishment. Advertisers are few despite the cheap rates. Sponsors can buy two dozen 30-second spots a day for a full week for $504. Editorial control, what little there is, lies entirely in the hands of Ms. Cain, a longtime freelance video producer, and Ms. Binder.

"We open the window a little wider, try to let things develop a little more," says Ms. Binder. "Sometimes we succeed, sometimes we fail, but we're willing to risk the process to find the truth."

The two edit tapes sitting side by side before two 13-inch monitors in a small backroom of Ms. Cain's Venice Beach house, which is littered with videocassettes. On the wall are pictures of President Bush and former presidents Reagan and Nixon. "They inspire me," Ms. Cain remarks, deadpan.

The pair seek a seamless tapestry of footage when they edit, and they discourage their 17 or so correspondents from

ever turning the camera off during shoots. "Process is product," says Ms. Cain, "I have a high tolerance for raw tape."

One of the more prolific correspondents, if not the most passionate, is Mr. April, a militant environmentalist who sleeps in a giant green tent in his living room. He drives from shoot to shoot in a 1970 Karmann Ghia, hugging the broken driver-side door so it doesn't swing open on curvy mountain roads. On a sweltering California afternoon, he dutifully follows and records Zeke the Sheik as he points out areas of interest in his compost pile.

The footage isn't exactly broadcast quality. When the compost beneath his feet crumbles, Mr. April struggles for balance and the camera wobbles. He inadvertently coughs in the middle of a question, and an overhead jet muffles Zeke's voice. "It may not be technically perfect, but it's flat-out honest," he says. "This is gonzo journalism with a human touch."

Extinct Butterfly

What the network lacks in polished professionalism, it makes up in serendipity. Mr. April once stumbled on a group of real estate agents playing softball in a park whose construction drove the last known Palos Verdes Blue butterfly into extinction, in violation of the Endangered Species Act.

The cameraman approached a middle-aged couple sitting on bleachers and asked them solemnly, "Are you aware this was the last known habitat of the Palos Verdes Blue butterfly?" "I'm sorry to hear that," the woman responded politely, as she continued to watch the game.

Mr. April also shot a story on a coyote that was feasting on the poodles of the rich. It included interviews with the distraught pet owners and the county agent called to trap the coyote. The animal was eventually shown writhing in a trap, and minutes later, a single gunshot was heard off camera as Mr. April zoomed in on the agent's truck and its logo: Animal Control.

The agent, identified on camera only as Louie, told the camera he didn't feel good about killing the coyote. "What justifies this in my heart and in my mind is the pets I

save. Here I saved perhaps 10, 20 cats."

It was a classic Camnet moment — unstaged and otherwise unremarkable, a snapshot of life made more dramatic by its appearance on a TV screen. "If you point a camera and let people say what they want to say, nine times out of 10 it's more stimulating, more interesting than some reporter who's more concerned with the perfect part down his hair," says Mr. April.

Mr. April hopes for the day Camnet becomes a full-fledged network, but he says it has already spawned a revolution. "It used to be that Big Brother is watching us," he says. "Now, it's Little Brother."

Steve Weinstein, *A Cable Network About the Real Word*, LOS ANGELES TIMES, October 16, 1992 at F24

Television: The fledgling CamNet presents footage shot on 8mm cameras by activists, amateurs and artists. In Southern California, it is seen by about 100,000 viewers.

Inside the Democratic convention last July, a fledgling cable network, armed only with a home video camera, roamed the aisles alongside NBC, CNN and PBS. But while the establishment media aired the speeches and the spin of the assembled pols, the CamNet camera focused elsewhere. The constant milling and inattention of the delegates, the hot dogs and sauerkraut, a reporter complaining about the frequent evocation of God and the lack of anything healthy to eat.

"I'm actually for some sort of spirituality in school, but you can't have God, because what about the people who believe in the Goddess? What about the secular humanists?" said correspondent Beth Lapides from somewhere in Madison Square Garden. "You really can get lost in this place. You get hungry, you get thirsty and the food here is really awful. And that very much symbolizes how hungry Americans are for some real food. How hungry I am for something nutritious to eat is how hungry America is for something good."

The two founders of CamNet, a 6-month-old cable network that presents mini-documentaries and features shot on 8mm home-video cameras by a contingent of activists, amateurs and artists, have essentially the same philosophy.

"TV is boring. You flip through and every channel is the same thing," said Nancy Cain, who operates CamNet out of her Venice Beach home with her partner, Judith Binder. "CamNet stops you. If you're flipping around and you see this, it doesn't look like public access and it doesn't look like television, and it looks like something is happening, and it looks like it might be live and it looks like you might be right in the middle of it. It's very often riveting and exciting. It's NBC-Not."

Only about 1 million people can see it, however. CamNet is available on cable systems in only eight cities, including Denver, Baltimore, Detroit and Philadelphia. In Southern California, CamNet can be seen by about [illegible] viewers on United Artists Cable in the East San Fernando Valley and La Puente-Baldwin Park area.

Home video, of course, is no stranger to television. The video-taped beating of Rodney G. King changed the very history of Los Angeles. "America's Funniest Home Videos" turned home bloopers into a Top 10 network smash, and "I Witness Video" shows grisly home video of accidents and disasters.

But Cain and Binder contend that CamNet is not "exploitative," not out for the video "Boing!" that punctuates those other shows.

"We're really the opposite of what you can see on television," said Binder. "We're trying to show events, issues or lifestyles that haven't had their say-so before. We'd like to be a real alternative."

The idea was born out of PBS' "The 90s," the populist camcorder magazine series on which Cain and Binder served as producers. When the program, now in its fourth and final season, died, they decided to test the concept on a broader scale.

Many of the stories CamNet has produced reflect the artsy, unorthodox background of the network's founders, although Cain said that their only guiding philosophy is "freedom of speech."

Binder, who was moved by the power of Frederick Weisman's *cinema verite* documentaries, has worked as a director and videographer in the performance art scene. Cain was a member of the Videofreex, a group that toured the country in the '60s and '70s producing experimental videos on Woodstock, the Chicago Seven and geodesic domes. CBS actually commissioned a pilot of their work, but, Cain said, one executive "told me that it was five years ahead of its time. He was wrong. It was 20."

The CamNet pieces — some sad, some funny, some haunting — include a visit to a condom store on Melrose Avenue to learn about teen-age sexual behavior, skinheads taunting Mexicans along the border, a trip to the Richard M. Nixon museum, a day in the life of New York City squatters

and a demonstration in Washington in the aftermath of the King beating verdict.

About 20 correspondents around the country tape these stories on their own cameras and send the raw footage to Venice, where Cain and Binder sit side-by-side at a tiny editing bay in the back of Cain's house. The duo trim and craft the raw tape into *cinema verite* reports — very few CamNet pieces contain narration — producing four hours of programming each month that is shown in repeated cycles.

Reaction has been mostly positive, Binder said. "Those who hate it call it a communist plot, but most people seem to love it." The city of Alameda threatened to sue CamNet over its somewhat clinical look at a woman and the device she uses for sexual stimulation, Binder said, but that has been the only serious complaint.

Their office receives phone calls almost every day from viewers who want to help them expand into other areas. One teacher at San Fernando High School uses the CamNet reports in his civics classes. And Barbara Brownell, a North Hollywood mother of three who discovered her teen-agers watching CamNet one day, was so "turned on" by it that she went out and bought her own camera and started making tapes.

"It's very intimate and very real," said Brownell, who just shot a piece on a homeless man who warms his food on his car engine. "You can get people to say things that they would never say to a big camera with a crew and a big microphone boom. Just by turning on this little camera and pointing it at someone you can discover the kind of charming and incredibly poignant human stories that would never happen with Ted Koppel."

Cain and Binder are financing the venture primarily out of their own pockets, paying their correspondents "essentially nothing." Advertisers are scarce, even though one week of hourly ads costs just $504, or $3 per spot. One of CamNet's most reliable sponsors, a Long Beach electronics store, burned down during the L.A. riots.

Nevertheless, Cain and Binder pledge to persevere. They brim with optimism that they will find their way onto

thousands of expanding cable systems and make money for themselves and their dedicated contributors. They continue to seek underwriting from several companies that are compatible with their philosophy, and a Tokyo firm is interested in airing CamNet on late-night television in Japan, Cain said.

"I think that some rich Asian newspaper magnate is going to want to get into television or [the head of a huge cable conglomerate] is going to see something about us and say, 'I'm sorry I didn't return your calls, but now I believe in you,'" Cain said. "I'm convinced that there is a market for us just like there is a market for Ted Turner's cartoon channel. I mean, how many of these same old cartoons can you look at?"

Joe Rhodes, *Video: Power to the People*,
TV GUIDE, November 28, 1992

CamNet, America's first all-camcorder channel, shows life on the fringe

When it premiered last March, CamNet — America's first all-camcorder network — became a sort of non-establishment C-SPAN. While cable-supported C-SPAN covers power in Washington, CamNet's army of unpaid photographers serves up raw, and often fascinating, scenes from the fringe that the traditional news media frequently ignore. And that, in turn, gives clout to people who don't hobnob with the elite.

CamNet has shown gang members' views of their neighborhood, rides on New York subways, racist skinheads at the Mexican border, and topless protesters outside the Democratic National Convention in New York City.

Each week, video vérité scenes like these are edited into a two-hour package that's continuously repeated on eight cable outlets reaching 819,000 homes.

"We think of it as real-life television," says Nancy Cain, who created CamNet with partner Judith Binder, and keeps it running from the back of her Venice, Cal., beach house. They hatched the idea when they saw how much camcorder material was available for PBS's *The 90's*, a series to which they contributed. With CamNet, they hope to, as Cain puts it, "demystify the media."

The cost is a mystery, though — Cain claims that CamNet has no working budget. They keep it going with their savings and a few small advertisers. But CamNet is designed to make a point, not a fortune. It's difficult to keep secrets when everyone has a camera, says Cain. As the Rodney King video showed, even government officials can't fight the power that ordinary citizens can wield with a tiny camcorder. — *Joe Rhodes*

MEDIA

[Cont. from 117]

ably offer their own cable TV programs in a few years.

These new phone, screen and satellite technologies make Ross Perot's mad vision of an electronic town hall inevitable. Perot was on the mark when he said his notion makes reporters crazy by making the White House press conference obsolete.

Reporters are also being shoved aside by a relatively low-tech opponent: video-driven, reality-based TV. How can a police reporter describe a murder when viewers can see one on *Cops?* What some producers call "unfiltered" programming, *Cops* is one of a whole generation of reality broadcasts — *Rescue 911, Code 3, Top Cops, Unsolved Mysteries, America's Most Wanted, Sightings, I Witness Video* — which prove nothing is more gripping than a real story. None of the broadcasts use what used to be called reporters.

This fall Time Warner unveiled New York 1 News, New York City's first twenty-four-hour local news channel. Local cable news operations already exist in Washington, D.C., California and New England, but the debut of New York 1 in the nation's largest TV market has gotten the attention of the thousands of journalists who live there, providing a showcase of the world to come. New York 1 News, and other cable channels expected to follow, will broadcast live high-school football games and City Hall tax hearings and Board of Education condom fights and four-alarm fires — things we used to need reporters to learn about.

In the United States anyone with a pen or pencil, a notebook, a still camera or a videocam — there are tens of millions — is a reporter. Some of them, like the amateur journalist who shot the police beating of Rodney King, will break the biggest stories in the country. They will provide the manpower, the audience and the voice for the next step in the evolution of information: the People's News.

The inevitable successor to the old and new kinds of transmitting stories, the People's

News will make journalists out of all of us and plug us back into the political system in ways that would have had the radicals who founded the nation's media dancing in their cobbled streets.

The People's News is, in fact, already on the air, although most journalists have never heard of it. It is CamNet, a nine-month-old cable network that airs documentaries and features shot on Hi-8mm video cameras by amateurs, artists, activists. Like Ted Turner's belittled vision of CNN a decade ago, CamNet is the brilliant vision for the next decade and beyond. Founded in a back room of a Venice Beach, California, home by two former PBS producers, CamNet has no corporate backing or market research. Just twenty picture makers scattered around the country. CamNet is so far available in only eight cities, including Los Angeles, Denver, Baltimore and Philadelphia. But it or something like it is coming soon to a TV set near you. It's the inevitable next stop in the liberation of television from network owners and broadcasters and its evolution as a medium that can interact with millions of people and return TV to individual Americans, a process Clinton, Perot and Brown legitimized.

CamNet's pieces are eclectic, odd, funny, haunting, spontaneous and strikingly apart from slick commercial-TV production values. CamNet stories include condom stores in L.A., skinheads taunting Mexicans along the border, the Richard M. Nixon museum, a Washington, D.C., march against police brutality.

"You really can get lost in this place," a CamNet correspondent reported during the Democratic Convention in Madison Square Garden. "You get hungry, you get thirsty, and the food here is really awful. And that very much symbolizes how hungry Americans are for some real food." CamNet returns individual, idiosyncratic, untutored voices to broadcasting, where the whole culture of TV journalism — pollsters, blow-dried reporters and anchors, advocates, spokespeople and lobbyists — is structured to keep them off. The People's News will show *us* in the mirror, not just them.

There may be lots of good reasons why reporters need to survive and why the current structure of journalism ought to

be preserved. But if they do exist, the media need to start articulating them.

So far the media, like the White House during 1992, show few signs of seeing themselves in crisis. The New News is largely still poohpoohed as unnerving, slightly dangerous and frivolous mush. Newspapers still run black-and-white pictures of events the rest of us saw twenty-four hours earlier in color, and white, middle-aged men in suits still sit behind evening-news anchor desks and say nothing much in grave and mellifluous voice.

Time does finally seem to be getting short. Perot's bloody loss did not reaffirm the media's importance or service to the republic. Quite the opposite. Like Marley's Ghost, his campaign brought with it visions of the future nobody wants to see.

The blunt reality is this: In a world where everybody is a journalist, then nobody really is. Journalists derived their power and special place in the country from the fact that they got to see history and relay it to us. If we're all seeing history as it unfolds and taking the pictures ourselves, then journalists seem increasingly, and sadly, doomed to follow the lumbering, awkward and poorly adapted institutions they work for into the country's history. The 1992 campaign and the technological revolution that is charging along on its heels suggest the death of the reporter is just a few channels away.

Appendix B

Program Segments Carried by The 90's Channel Dealing with Sexuality

"Self-help." A women's health organization in Austin, TX seeks to demystify gynecology, teaching women how to perform their own pelvic examinations. The organization's director is interviewed on the intimidating nature of gynecological procedures, and an internal examination is shown. A woman's pudenda are visible.

"Mapplethorpe Exhibit." The controversy over the Robert Mapplethorpe exhibit at a Boston art museum. Interviews with attendees are interspersed with images of many of the photos, including some of his most dramatic nudes. One man protests that $30,000 in government funding was spent "to put picture frames around these hideously obscene pictures." A woman observes that while nudes of women are common, Mapplethorpe is one of the few photographers who celebrates the beauty of the male body. She speculates that this quality is threatening to certain men. The museum director says he thinks that the exhibit has brought important issues concerning racism and homophobia into the public debate.

"Abortion Protest." This piece documents performance art by Elise Millikan. Millikan appears in front of a billboard which overlooks a New York street, and which bears the image of a giant coat hanger. She removes her overcoat, and, naked, performs a simulated self-abortion. She screams. Red liquid splatters copiously, staining considerable portion of the billboard. Interviews follow with passers-by and with Millikan. She says: "The government doesn't own my body. The government doesn't own my art. So hands off."

"Fertility Festival." Images and sounds from the annual fertility festival in Iuyama, Japan, complete with bright costumes

and a street procession. Many of the objects carried by marchers are totems shaped like penises.

"The Kind and Di." Di, a Los Angeles woman, buys a dildo. This is her first-person story of why and how she did it. It develops that she is disillusioned by the phoniness of courtship, and depressed that she is not in love. In a decision she admits is bitter-sweet, she resorts instead to a sexual device. She holds up the dildo, which is made of clear plastic and shaped like a penis. She switches it on. She discusses its features and pleasures with Judith Binder, who both operated the portable camera and produced the piece.

Cover Redacted

COMMENTS OF INTERMEDIA PARTNERS

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SUMMARY OF ARGUMENT

InterMedia Partners believes that the so-called "voluntary" prohibition of indecent material and other types of programming on cable television leased access and public, educational and governmental ("PEG") channels, violates the First Amendment of the Constitution. Nevertheless, InterMedia believes that it is compelled to ban such programming in order to avoid potential liability for the exhibition of certain programming which are shown on channels it does not control. Any rules established by the FCC must provide cable operators flexibility to adopt workable program policies. This includes permitting cable operator to: (1) require appropriate certification and indemnification; (2) terminate a user's access to a channel if that user violates the operator's program policy; (3) require that certain programs be placed on a "blocked" leased access channel; and (4) pre-screen and prohibit the exhibition of any program that the operator reasonably believes is obscene, indecent or solicits or promotes unlawful conduct.

InterMedia recognizes that the FCC is obligated to implement the 1992 Cable Act, and in particular Section 10 of the Act. Therefore, in order to promote the public interest and to establish a consistent body of case law, the FCC must assert exclusive jurisdiction over the enforcement of any regulations promulgated pursuant to Section 10. Specifically, the FCC must preempt state and local regulation of program content, establish a national standard for defining indecency, and adjudicate disputes among

cable operators, programmers, leased access channels lessees, and PEG users.

Finally, the FCC must recognize and make some accommodation in its rules for the added time and expense that will be required to technically "block" leased access channels which may exhibit indecent programming. The cable operator should not be required to absorb the costs of implementing Section 10. Moreover, the FCC must consider these costs in its ratemaking proceeding on leased access channels.

FCC Caption Omitted

COMMENTS OF INTERMEDIA PARTNERS

I. Introduction

InterMedia Partners ("InterMedia"), by its attorneys, hereby submits these comments in response to the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM") in the above-referenced proceeding.

InterMedia owns and operates cable systems throughout the United States. InterMedia currently provides commercial leased access channels pursuant to Section 532 of the Communications Act of 1934, as amended (47 U.S.C. § 532) ("the Communications Act"), and public, educational and governmental ("PEG") channels pursuant to the requirements of InterMedia's various franchise agreements. InterMedia is obligated to lease access channels to individuals pursuant to 47 U.S.C. § 532(a). Franchising authorities have a similar interest in promoting the use of PEG channels.

The purpose of the instant proceeding is to promulgate regulations so that cable system operators may take all necessary and lawful steps to limit their liability for program content on leased and PEG access channels; channels over which operators have virtually no control. Accordingly, InterMedia has a direct

interest in the outcome of this proceeding and submits the following comments in response to the FCC's NPRM.[1]

II. "Voluntary" Prohibition of Indecent Programming on Leased and Peg Access Channels

A. Threat of Litigation Does Not Make Programming Policies "Voluntary"

Section 10(a)(2) of the Cable Consumer Protection and Competition Act of 1992 (hereinafter "1992 Cable Act") permits cable operators to "voluntarily" establish a "written and published policy of prohibiting programming" that the cable operator "reasonably believes" contains obscene and/or indecent programming on leased access channels. Section 10(c) allows operators to "voluntarily" prohibit "sexually explicit conduct" and "material soliciting or promoting unlawful conduct" on PEG channels.

In fact, because Section 10(d) eliminates cable operators' statutory immunity from liability for the transmission of obscene programming on leased and PEG access channels, such policies are hardly "voluntary." InterMedia anticipates that the practical result of Section 10 will be that cable systems will establish policies which ban all "questionable" programming altogether, applying the policy broadly in order to avoid liability. If the cable operator does not prohibit *potentially* obscene and indecent material, the alternative is to rely on the lessee's or PEG user's judgment as to what is indecent or obscene.[2] Clearly, there is a conflict in interest for the lessee/PEG user to self-censor its program material. Moreover, the "deep pockets" of cable operators are a likely target for lawsuits.

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[1] While InterMedia is commenting in this proceeding, it wishes to make clear that it firmly believes these provisions violate the First Amendment of the Constitution, and InterMedia supports the efforts of Time Warner and others to strike them down in Federal Court.

[2] Obscenity is based on local values under *Miller v. California*, 413 U.S. 15 (1973). Operators, such as InterMedia will use a "highest" common denominator approach to avoid litigation.

Given the serious consequences of violating the Communications Act or state statute, cable operators will feel obligated to take significant precautions.

As an example of the consequences, many franchise agreements specify that a violation of the Communications Act, or any state or federal criminal statute, is a material violation of the franchise. If a PEG user violates an operator's policy of prohibiting obscene or indecent material, the *operator* may be liable for violating the Communications Act and may also be required to defend a federal or state criminal obscenity prosecution. Similarly, if a leased access channel lessee exhibits "indecent" programming in violation of the operator's policy banning such material, the operator could be liable for violating the Communications Act by failing to place the program on a blocked channel.

B. Intermedia's Policy Prohibiting Indecent Material on Leased Access Channels

Given the present statutory language of the 1992 Cable Act, InterMedia feels that it is necessary to ban all indecent programming material from its leased access channels. InterMedia outlines below the steps that it believes are necessary to insure that it complies with the difficult provisions of the 1992 Act. Commission approval of such policies and practices in its Report and Order and in final rules adopted in this proceeding, is vital to preserve cable service. Moreover, as discussed below, the FCC must preempt state and local regulations or actions that interfere and conflict with the purpose of this proceeding.

Effective December 4, 1992, InterMedia will require lessees to certify that they will not carry obscene or indecent programming. InterMedia will review, at the lessee's request, or in certain circumstances, on its own initiative, any program material which might conceivably be construed as obscene or indecent, and advise the lessee within 14 days whether it may cablecast the programming.[3] A determination by InterMedia that a particular

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[3] InterMedia will request pre-screening if it has reasonable belief that the program is obscene or indecent.

program is obscene or indecent will be the final determination of the issue. If a lessee transmits any material on a leased access channel which InterMedia reasonably believes violates its policy, the lessee's access to the channel will be terminated immediately, and that lessee will be prohibited from acquiring any leased channel capacity from InterMedia in the future.

To effectively implement such policy, InterMedia will require most lessees of leased access channels to obtain insurance, similar to broadcaster's liability insurance, which will name InterMedia as a beneficiary.[4] Proceeds from the insurance policy would be used by InterMedia in the event of a lawsuit arising out of the transmission of obscene or indecent material.

In deciding to implement this policy, InterMedia considered several alternatives. InterMedia could require lessees to post a bond sufficient to cover the cost of possible fines and forfeitures, However, bonds are difficult to collect and do not provide for attorney's fees to defend potential lawsuits. InterMedia also considered and rejected as too severe a requirement that lessees provide an irrevocable letter of credit to cover anticipated costs of liability.

InterMedia recognizes the public policy goals behind promoting the use of leased access channels. There is a likelihood that implementing the programming policy outlined above will deter or even prevent the use of leased access channels by some individuals and companies. However, InterMedia presumes that Congress considered carefully the impact of Section 10, and weighed the competing public policies of promoting diversity of

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[4] If a lessee cannot demonstrate sufficient balance sheet strength to support an indemnification, InterMedia will require the lessee to obtain broadcaster's liability insurance. It has been InterMedia's experience that many potential lessees are highly under-capitalized. Thus, insurance is necessary in lieu of a bare indemnity.

viewpoint with the concerns over children's access to obscene and indecent material on leased channels.[5]

C. Intermedia's Policy Prohibiting Certain Programming on PEG Channels

Similar to its policy with respect to leased access channels, InterMedia believes for the reasons stated above, that it is necessary to ban all "obscene" and "indecent" programming on its PEG channels in order to protect itself from potential liability for program material that it does not control.[6] 1992 Cable Act § 10(c). InterMedia will also prohibit material which it reasonably believes solicits or promotes unlawful conduct. Although the Commission indicated in the NPRM that it believes Congress intended "unlawful conduct" to refer only to prostitution. InterMedia will interpret and apply this restriction broadly to cover a greater range of possible criminal activities, until the FCC or the Courts limit the broad statutory language of Section 10(c).

At the request of any PEG user, InterMedia will review any program material (within 14 days) to determine whether such material complies with InterMedia's policy. In addition, InterMedia reserves the right to preview any material which it reasonably believes may violate its policy. InterMedia's determination as to whether a particular program complies with its policy will be the final determination.

InterMedia operates a cable system where the public access channel is programmed and controlled by an independent public

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[5] Placing indecent programming on a special, scrambled leased channel is not a realistic alternative unless, of course, the program schedule of a commercial lessee contains repeated, indecent offerings. Scrambling a normally unscrambled channel requires a significant amount of time and labor in most systems operated by InterMedia.

[6] InterMedia agrees with the Commission's tentative conclusion that "sexually explicit conduct" was intended to refer to the same material defined as "indecent." Therefore, InterMedia will interpret "sexually explicit conduct" the same as it would interpret "indecent" material, unless the Commission's final rules indicate otherwise.

access corporation. InterMedia will require the corporation to obtain the same type of insurance policy as it will require for leased access channel lessees.[7] Such an insurance policy will name InterMedia as a beneficiary and its proceeds will be used by InterMedia to defend itself in any action arising out of the exhibition of obscene or indecent material on the public access channel.

All individual users, and where applicable, the access corporation, will be required to certify that no material that violates InterMedia's policy will be exhibited.[8] Moreover, each individual user and the access corporation, will be required to indemnify InterMedia for any liability arising out of the transmission of any obscene or indecent material. In the event that either the corporation or an individual user of InterMedia's PEG channels violates the policy, InterMedia will immediately, and permanently, terminate the violator's access to all InterMedia's PEG channels.

D. Censorship and Prior Restraint Concerns require Strong FCC Involvement

Notwithstanding the 1992 Cable Act, indecent material is constitutionally protected speech, and attempts to ban such material on cable television have been struck down in the courts. *Community Television of Utah v. Wilkinson*, 611 F. Supp. 1099 (D.C.Utah 1985). InterMedia is concerned that screening out potentially indecent programs, material containing "sexually explicit conduct," and "material soliciting or promoting unlawful conduct," could raise claims of unconstitutional prior restraint.[9]

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[7] Because of potential liability, InterMedia can no longer delegate all authority over the channel to the corporation.

[8] See discussion at p. 14-16 infra regarding cable operators' limited liability where the access channel users certify they will comply with the cable operator's policies.

[9] "The schemes that have been invalidated by the Supreme Court as prior restraints on speech had this in common: they gave public officials the power to deny use of a forum in advance of actual expression." *Dial* (continued...)

A regulatory or statutory requirement that cable operators ban indecent programming is very likely to be unconstitutional.[10] While Senator Helms' discussion in the Congressional Record on the passage of S.12 argues that a "voluntary" prohibition of indecent material by cable operators is not a "state action" which triggers First Amendment concerns, that issue is clearly open.[11] However, until the courts address the issue, the FCC must assert exclusive jurisdiction over any prior restraint issues surrounding prohibited uses of leased and PEG access channels.

For example, InterMedia's policy prohibiting obscenity and indecency on leased access channels provides that: (1) the channel may not be used for the transmission of such programming; (2) if

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[9](...continued)
Information Services v. Thornburgh, 938 F.2d 1535, 1543 (2nd Cir. 1991), *citing*, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

[10] Apparently, Senator Helms conceded that unless the ban on obscene and indecent material is implemented voluntarily, it will *not* withstand constitutional scrutiny. *See* January 30, 1992 CONG. REC., p. S646. Moreover, in *F.C.C. v. Midwest Video Corp.*, 440 U.S. 689, 695, n.4 (1979), the Supreme Court noted with approval that the Court of Appeals for the District of Columbia Circuit stayed the FCC's 1977 regulation which *required* cable operators to prohibit the transmission of obscene and indecent material on access channels. "The [Court of Appeals] disapproved the requirement on the belief that it imposed censorship obligations on cable operators." *Id.*

[11] January 30, 1992, CONG. REC., p. S646 - S649. Senator Helms cites *Dial Information Services*, *supra*, for the proposition that the Constitution permits cable operators to voluntarily ban indecent programming. However, the telephone companies in *Dial Information Services* did not *ban* the transmission of indecent messages. Rather, the dial-a-porn providers were required to notify the telephone company which messages were indecent so that the telephone company could activate the presubscription provision. Furthermore, it has yet to be adjudicated as to whether a "voluntary" ban imposed by cable operators, which this statute permits and in essence mandates, is a state action for purposes of Constitutional analysis.

the lessee violates InterMedia's policy, access to InterMedia's cable system will be immediately terminated; and (3) parties who violate InterMedia's policy will be barred from obtaining channel capacity in the future. Given InterMedia's concerns over questions of prior restraint, InterMedia urges the Commission to assert exclusive jurisdiction over disputes concerning permitted uses of leased access capacity. The same applies to PEG access channels — prohibiting the exhibition of certain questionable material could raise prior restraint issues by PEG users.

* * *

RESPECTFULLY SUBMITTED,

INTERMEDIA PARTNERS

By: /s/
Stephen R. Ross
Kathryn A. Hutton

ROSS & HARDIES
888 16th Street, N.W.
Washington, D.C. 20006

Dated: December 7, 1992

FCC Caption Omitted

COMMENTS OF MANHATTAN NEIGHBORHOOD NETWORK

Manhattan Neighborhood Network submits these comments in response to the above captioned proceeding. The Commission's Notice of Proposed Rule Making invited comments on the enactment of regulations that enable a cable operator to prohibit the use of any public, educational, or government access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.

Manhattan Neighborhood Network is a non-profit organization responsible for administering the public access channels in the Borough of Manhattan. Manhattan Neighborhood Network assumed administrative responsibility for the pubic access channels in September 1992 after twenty years of administration by the local cable operators. Our experience in operating the public access channels in Manhattan provides us with unique expertise in this matter before the Commission.

1) The mission of Manhattan Neighborhood Network is to ensure the ability of Manhattan's residents to exercise their First Amendment rights through the medium of cable television. Manhattan Neighborhood Network encourages participation among the diverse racial, ethnic and geographic communities within the Borough and provides people with open non-discriminatory access to cable television for non commercial programming. We believe that our mission supports the intent of Congress in dedicating access channels as the video equivalent of the speaker's soapbox, fostering a diversity of viewpoints to viewers and furthering the goals of the First Amendment. The provisions under consideration by the Commission could seriously impair our ability to fulfill this mission.

2) Public access in New York has a history of providing a voice to people who would not otherwise have a means of public

expression. The complexities and conflicts of urban life are often explored on public access providing greater understanding among the people of Manhattan.

3) In Manhattan, as elsewhere around the country, the cable operator has no editorial control over the public access channels. Editorial control by the cable operator or any other entity managing public access endangers the principle of public access. Regulations "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct" is disturbingly vague. We feel that this provision will threaten people's First Amendment rights and create a chilling effect on the use of public access by potential users in Manhattan.

4) To be sure, Manhattan Neighborhood Network does not support or endorse obscene programming or unlawful conduct. The question is what is the most effective means to deal with programming that may cross the line within the context of the First Amendment. To that end, we believe that local and federal law, along with appropriate judicial review, is the best means for dealing with obscenity and other unlawful conduct should they occur through public access or any other forum. If necessary, these laws can be effectively enforced against the program producer. We cannot imagine regulations censoring programming in advance that would not compromise public access and abridge speakers' rights under the Constitution.

5) There are currently two public access channels on each of Manhattan's two cable systems with two more channels on each system to be activated in early 1993. Demand for time on the public access channels constantly exceeds supply. Currently, the public access channels carry approximately 590 different programs per week totaling over 300 hours. With the addition of the new public access channels in 1993, we anticipate this number to increase by about fifty percent.

6) Public programs are generally produced by volunteers. People work with very limited resources contributing mainly their time and talent. Any regulations that would place increased burdens on producers would undoubtedly diminish the use of the public access channels.

7) It is our view that the access provisions under review are unconstitutional. However, if the Commission adopts rules to implement these provisions, the rules should be as specific and as narrowly defined as possible. Cable operators must not be permitted to curtail the legitimate public use of the access channels under a broad umbrella of program regulation.

8) The enforcement of program regulations will cause enormous practical difficulties preventing many programs from taking place at all. The people responsible for public access will be burdened by having to interpret and apply broad regulations to specific programs. The resulting cost for the necessary expertise to make these enforcement decisions will create an expense for both the cable operator and the public access producer. Such expense could be prohibitive to the public access producer thereby negating the producer's right to speak. Many speakers may never appear on public access for fear that they might be in violation of the regulations.

10) Several programs on Manhattan's public access channels are live and include interaction with the public via telephone. These programs are often forums for lively debate on local and national issues. We wonder how such programs could effectively be screened in advance to comply with program content regulations. Would such regulations pre-empt all such live programs therefore silencing many potential speakers within our community?

11) In 1993, we expect the volume of programs on Manhattan's public access channels to exceed 450 hours per week. Pre-screening to comply with cable operator rules would require about twelve dedicated full-time staff people, more than the entire staff currently employed by Manhattan Neighborhood Network. In addition to this added cost, enforcement of regulations would certainly delay programs dealing with timely issues thereby greatly reducing the effectiveness of those programs.

12) The Commission should make sure that the cost for any actions taken by the cable operator under this provision be undertaken at the operator's expense. Of course, the cable subscriber will ultimately bear the added cost.

13) We note with irony the Senate debate leading to the approval of the amendment necessitating the Commission's current deliberations on public access. According to a transcript of the U.S. Senate's debate on January 30, 1992, Senator Fowler referred to the use of public access channels to solicit prostitution through shams such as escort services, fantasy parties and live call-in shows. Senator Wirth elaborated by referring to the public access in New York City as "the most prurient and, in fact in many ways grossly illegal access one could imagine." We know of no program on Manhattan's public access channels that solicits prostitution through escort services, fantasy parties, live-call-in shows or any other means. In fact, commercial programming and advertisements of all types are expressly prohibited on public access by Manhattan Neighborhood Network policy statement.

14) We can not help but think that a serious error was made and that perhaps what Senator Wirth viewed on cable television in New York was the cable operator's "commercial use" or "leased access" channel. We note that Time Warner's "commercial use" or "leased access" channel regularly features advertisements for a variety of adult services. The manner in which the "commercial use" or "leased access" channel is operated in Manhattan should not lead to burdensome and unnecessary regulations imposed upon public access channels here and elsewhere across the country. Although Manhattan Neighborhood Network would not necessarily restrict non commercial programming of a sexual nature falling within the bounds of the First Amendment and applicable law, that type of programming is rare and infrequent. We urge the Commission not to jeopardize the integrity of public access as a First Amendment forum based upon erroneous perceptions or the fear that an isolated program may be potentially offensive to some viewers.

Respectfully Submitted,

/s/

Alexander Quinn,
President
Manhattan Neighborhood Network
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Date: December 4, 1992

FCC Caption Omitted

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, "the Local Governments") submit these comments in the above-captioned proceeding.

I. INTRODUCTION

The Federal Communications Commission ("FCC" or "Commission") seeks comment on implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"). Section 10 permits cable operators to prohibit indecent programming on the leased access channels on their systems, and eliminates cable operators' statutory exemption from liability for programming on access channels that involves obscene material. Section 10 also directs the FCC to promulgate regulations "designed to limit the access of children to indecent programming . . . which cable operators have not voluntarily prohibited," and to enable cable operators to prohibit the use of any public, educational, or governmental ("PEG") access channel "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct."

The Local Governments concur in the Commission's interpretation that the primary responsibility for identifying obscene material under Section 10 should be placed on programmers of leased and PEG access channels, rather than on cable operators. The programmer has the best knowledge of the content of the programs on access channels, and the cable operator should not be permitted — much less required — to censor programming on PEG

or leased channels. Accordingly, the Local Governments support the Commission's proposal which would allow cable operators to require programmers to identify obscene programming and to certify that all other programming does not contain obscene or indecent material.

The Local Governments submit, however, that the unique role of PEG channels in providing important programming in the public interest and encouraging the free flow of information among all segments of the community should be taken into account with respect to regulations governing responsibilities of providers of programming for PEG access channels. In particular, considerations of administrative ease and the prevalence of live programming on PEG access channels should support modification of the Commission's proposed rules concerning certification by PEG program providers.

II. DISCUSSION

A. PEG Access Channels

PEG access channels perform the vital function of ensuring that a diverse range of programming in the public interest from diverse sources is provided on cable systems. Many franchises regularly provide for one or more governmental channels which may be programmed by a government-related entity or government agency; educational channels, which may be programmed by one or more local institutions of higher learning or the local school system; and public access channels, which may be available for distribution of programming by the public on a first-come, first-served basis. Governmental channels carry such programming as local government meetings and deliberations, school board meetings, community events, citizen forums on current events, job bulletin boards, and information on availability of government services. Educational channels may provide primarily educational and informational programming, in many cases at no cost to the viewer. The public access channels are often managed by a public access organization, independent of the local franchising authority, that establishes and administers rules for the distribution of programming by the public. The unique nature and important function of PEG channels has been recognized by Congress:

> Public access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet. They provide groups and individuals who generally have not had access to the electronic media with the opportunity to become sources of information in the electronic marketplace of ideas. PEG channels also contribute to an informed citizenry by bringing local schools into the home, and by showing the public local government at work.

H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 30 (1984).

Given the wide array of PEG programming and the potential administrative burdens of requiring programmers to provide, on a program-by-program basis, certification that certain programming does not contain obscene material — particularly when a substantial amount of the programming on PEG channels is live, the Local Governments urge the Commission to modify its proposed rules with respect to certification by PEG program providers in certain important respects.

First, the Local Governments urge the FCC to adopt regulations that would allow programmers to certify their programs on as broad a basis as the programmers deem appropriate. For example, a programmer could choose to provide a blanket, rather than program-by-program, certification that its programs do not contain obscene material. Such certification could be renewed annually, and would allow cable operators to place primary responsibility on programmers for ensuring that programs containing obscene material are not aired on the PEG access channels — without unduly burdening the administrative capabilities of those responsible for public interest programming.

Second, the Local Governments submit that some programming on PEG access channels, particularly live programming, is not amenable to prior certification as to its content. The Local Governments therefore urge the FCC to modify its regulations governing certification by PEG access providers. Such regulations would allow programmers of live formats to certify that they have exercised reasonable efforts to ensure that their programs will not

contain obscene or otherwise proscribed material. This "reasonable efforts" certification should apply generally to various PEG formats because of the unique nature of PEG access programming.

Finally, the FCC has suggested that disputes between cable operators and programmers of PEG access channels should be resolved by franchising authorities at the local level. The Local Governments believe that a better approach would be for such disputes to be resolved in the judicial system. Such disputes ultimately will be resolved in the judicial system; requiring franchising authorities to mediate such disputes merely will add an additional, inefficient step to resolution of disputes of the constitutional issues that inevitably will be decided by courts. This is especially true in connection with the PEG access channels, where the franchise authority may be the programmer, the editor or the facilitator.

B. Leased Access Channels

The Local Governments agree with the Commission's approach with respect to programming on leased access channels. Programmers, rather than cable operators, should bear the primary responsibility for identifying programs containing obscene material and for certifying that programs not so identified do not contain obscene material. The Local Governments furthermore support existing law providing that lock boxes shall be available to block access to cable services; nothing in the 1992 Act alters this existing law or mandates that lock boxes should be available only to block programming on the single leased access channel containing indecent programming. Many subscribers may wish to block programming on other channels. The 1984 Cable Act is quite specific in requiring the availability of lock boxes; this requirement should be enforced strictly. 47 U.S.C. § 544(d)(2)(A).

III. CONCLUSION

The Local Governments believe that the Commission's approach is sound with respect to implementing Section 10 of the 1992 Act. The Commission should take special care, however, to accommodate the unique public interest and administrative concerns of program providers for PEG access channels by allowing such

providers to make blanket, rather than program-by-program certifications, make only "reasonable effort" certifications with respect to live programming not amenable to prior certifications, and have disputes with cable operators resolved in the first instance by the judicial system.

Respectfully submitted,

/s/

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December 7, 1992

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COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION, INC.

* * *

The problems caused by prohibiting operators from exercising editorial discretion over their channels are well known. In fact, the legislative history of the Act recognizes that the leased and PEG access requirements of the 1984 Cable Act have caused operators to allow programming on their systems that they and their subscribers may find objectionable.[4] But rather than eliminating entirely the access requirement in order to avoid these intrusions on editorial discretion, the Act imposes a different — and troublesome — remedy. It allows operators to deny access to *some* speech — but only to speech that the *government* defines as objectionable.

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[4] *See* Statement of Senator Thurmond, 138 CONG. REC. S648 (daily ed. Jan. 30, 1992) ("It is truly disturbing that cable companies are forced to give [objectionable] programs a public forum and that cable subscribers must accept this porn as part of basic cable.")

Respectfully submitted,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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Daniel L. Brenner

By _____/s/_____
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December 7, 1992

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COMMENTS OF TELE-COMMUNICATIONS INC.

* * *

The courts have repeatedly recognized that, unlike broadcasting, cable permits consumers to exercise several levels of control over their program selection and viewing.[5] For example, cable subscribers must affirmatively elect to have cable service brought into their homes; cable subscribers can request a lockbox from the cable operator to block any channel; and, if cable subscribers are dissatisfied, they can cancel their subscription at any time. Similarly, cable programming is unlike telephony because it is not a necessity.

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[5] See *Jones v. Wilkinson*, 800 F.2d 989, 991 (10th Cir. 1986), *affd.*, 480 U.S. 926 (1987); *Cruz v. Ferrel*, 755 F.2d 1415, 1419-22 (11th Cir. 1985).

Notwithstanding its strong view that leased and PEG access are unconstitutional, TCI offers the following comments because its systems will be directly and significantly burdened by Commission rules issued to implement Section 10.

In addition to the inherent constitutional problem, there is a fundamental internal inconsistency in the schemes for leased access and PEG access, particularly as amended by the 1992 Act. On the one hand, Congress prevents cable operators from exercising control over the content of leased and PEG access channels. 47 U.S.C. §§ 531(e) and 532(c)(2). On the other hand, Congress imposes on operators criminal, as well as civil liability for certain programming carried on those channels. 47 U.S.C. § 558

* * *

Positive traps are a form of interdiction that involves inserting a jamming carrier at the headend of a cable system between the video and audio carrier of a signal. This significantly degrades the picture quality and causes a repetitive beep in the audio. Subscribers need a device that is attached to the television set to descramble the signal.

Lockboxes are another form of interdiction. Since 1984, cable operators have been required to provide lockboxes to requesting subscribers. *See* 47 U.S.C. § 544(d)(2)(A). In the Notice (para. 9), the Commission inquires whether, in light of the 1992 Act, cable operators should still be required to provide lockboxes. There appears to be nothing in the Act that would eliminate that requirement. The Commission should also conclude that lockboxes are an option for blocking indecent leased access channels in satisfaction of the cable operator's obligation under 47 U.S.C. § 532(j)(1)(B). TCI is not aware of any significant problems with lockboxes. To the contrary, lockboxes give subscribers another method of controlling their program viewing, a clear goal of Section 10 of the Act. Thus, lockboxes, pursuant to the requirements of 47 U.S.C. § 544(d)(2)(A), should be an appropriate method of satisfying a cable operator's obligation to block indecent leased access channels.

* * *

Respectfully submitted,

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December 7, 1992

Appendix Omitted

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COMMENTS OF TIME WARNER ENTERTAINMENT COMPANY, L.P.

Table of Contents Omitted

SUMMARY

Time Warner Entertainment Company, L.P. ("TWE") has taken the position that being compelled to carry leased access (commercial use) and public, educational and governmental ("PEG") programming is a violation of TWE's rights as a First Amendment speaker. *See Time Warner Entertainment Company, L.P. v. FCC*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992). Yet, because TWE and its divisions will be affected by any rules issued by the Commission concerning these types of programming, it offers the following comments.

To accomplish Congress' goals, TWE believes the Commission should promulgate rules that:

- provide for channel blocking procedures that reflect the technological and programming realities of the cable industry;
- permit cable operators to require certification, notice and indemnity regarding indecent material from commercial use program providers;
- recognize that many PEG channels are not administered by cable systems, but instead are administered by an agency of the local government or by a community access organization;

- permit cable operators and community access organizations to require certification and indemnity from PEG program providers;
- establish a procedure whereby disputes regarding prohibited PEG programming are resolved; and
- adopt a definition of "indecent" and "sexually explicit" material that incorporates a community standard "for the cable medium" as measured by the "average cable user" on a nationwide basis and judges material within the whole program and the merit of the work.

TWE believes the recommendations set forth above fully comport with Congressional policy and would best serve the public interest.

FCC Caption Omitted

COMMENTS OF TIME WARNER
ENTERTAINMENT COMPANY, L.P.

Time Warner Entertainment Company, L.P. ("TWE") respectfully submits the following comments regarding the Notice of Proposed Rule Making ("NPRM"), released November 10, 1992 and relating to the implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").

Introduction

TWE is a partnership, which is primarily owned (through subsidiaries) and fully managed by Time Warner Inc., a publicly traded Delaware corporation. TWE is comprised principally of three unincorporated divisions: Time Warner Cable ("TWC"), which operates cable television systems; Home Box Office, which operates pay television programming services; and Warner Bros., which is a major producer of theatrical motion pictures and television programs.

TWC, which is the TWE division most affected by Section 10 of the 1992 Cable Act, owns and operates cable systems in approximately 1,000 franchise areas throughout the United States. As required by the Cable Communications Policy Act of 1984 (the "1984 Cable Act") and many local franchises, these systems carry both leased access and public, educational and governmental ("PEG") access channels. Because of this, TWC and its divisions are directly impacted by the Commission's proposed rules relating to indecent programming and other types of material on cable access channels.

One striking example of a TWC cable operator that will be immediately and directly affected by the Commission's rules is Time Warner Cable of New York City ("TWCNY"), which serves, among other parts of that City, over 250,000 subscribers in the southern portion of Manhattan. TWCNY's Manhattan system has over 70 channels and offers more than 10 leased access and 5 PEG channels.[1] On both its leased access and PEG channels TWCNY is required under the 1984 Cable Act to carry programming that may at times be indecent, which it otherwise would not choose to provide. Indeed, on leased access Channel 35 TWCNY has at least five hours daily of "adult" programming from at least 9 producers offering sexually explicit programming. Most of the adult programmers offer one or more programs on a daily or weekly basis on time they lease by agreement from TWCNY in periods from 13 to 78 weeks.

For example, TWCNY in required to carry on Channel 35 in Manhattan a series entitled "Midnight Blue" twice a week from midnight to 1:00 a.m. Portions of "Midnight Blue" include excerpts from sexually explicit video cassettes and films showing in graphic detail intercourse, masturbation and other sex acts. The commercials shown on "Midnight Blue" advertise sex-oriented products and services, such as "escort services", "dial-a-porn" telephone lines and Screw Magazine ("Midnight Blue"'s print counterpart). On Channel 35, each day from 10:00 p.m. to 4:30 a.m. is usually fully booked with sexually explicit programming and

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[1] In 1993, TWCNY is committed to provide 9 PEG channels.

the demand for additional time remains high. Most of these programs are provided on videotape and require the system to handle and process dozens of video cassettes every week.

In addition, various other TWC cable systems carry programming that is considered by some viewers in their localities to be indecent. For example, TWC's system in Austin, Texas was provided programming by a public access programmer that combined nude scenes from a movie, photographs of aborted fetuses, and a man shooting himself in the head. TWC's cable system in Indianapolis, Indiana has carried on its public access channel "safe sex" programming, which includes sexually graphic descriptions. And, TWC's cable system in Cincinnati, Ohio has carried on its public access channel nude sports programming supplied by a nudist organization.

In its pending action against the Commission, *Time Warner Entertainment Company, L.P. v. FCC*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992), TWE takes the position that the leased access and PEG channel requirements (Sections 611 and 612 of the 1984 Cable Act (47 U.S.C. §§ 531, 532) and Section 7(b)(4)(B) of the 1992 Cable Act), as well as the must carry channel requirements (Sections 4 and 5 of the 1992 Cable Act) unconstitutionally compel it to speak in a manner that it would not otherwise choose. This is a violation of TWE's rights as a First Amendment speaker. In addition, TWE challenges the leased access, PEG and must carry requirements because they seize, without adequate compensation, substantial portions of its facilities (an average of roughly more than 30% of TWC's systems' channel capacity) and transfer control of that capacity to other speakers. This is a violation of the Takings Clause of the Fifth Amendment. In submitting these Comments, TWE specifically reserves, and does not waive, its constitutional rights, and these Comments are filed without prejudice to TWE's constitutional challenges.

Notwithstanding TWE's position on being forced to carry leased access and PEG programming, but recognizing that the Commission must act pursuant to the obligations imposed by the 1992 Cable Act, since TWE and its divisions will be further burdened directly by any rules issued by the Commission, it offers the following

comments regarding the proposed rules for carriage of material that is indecent on leased access channels and material that is obscene, indecent or solicits or promotes unlawful conduct on PEG channels.

I. Proposed Rules Regarding Indecent Programming on Leased Access Channels.

Section 10(b) of the 1992 Cable Act directs the Commission, within six months from October 5, 1992, to promulgate regulations limiting the access to indecent programming on leased access channels, to the extent that cable operators have not voluntarily done so pursuant to Section 10(a), by (i) placing all indecent programming on a separate channel, (ii) blocking the channel unless the subscriber requests access thereto in writing, and (iii) requiring programmers to inform cable operators in advance if the programming they are providing is indecent.

A. The Definition of "Indecent"[2]

Section 10(b) of the 1992 Cable Act does not define "indecent". The Commission is proposing to adopt the definitional language of Section 10(a) as the definition of indecent. The definition should, as proposed, incorporate a community standard "for the cable medium". Additionally, the rule should make clear that the standard is that of the "average cable viewer" on a nationwide basis, much as the Commission has done in the broadcast area.[3]

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[2] Although TWE discusses below the proper definition of "indecent," nothing herein concedes that it is constitutionally permissible for the government to prohibit or restrict the carriage of indecent programming on cable television.

[3] *See In re Infinity Broadcasting Corp.*, 3 F.C.C. Rcd. 930, 933 (1987), *remanded on other grounds sub nom. Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988) ("[T]he purpose of 'contemporary community standards' [is] to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group. . . . Hence, in a Commission proceeding for indecency, in which the Commission applies a concept of 'contemporary community standards for the broadcast

(continued...)

Moreover, the rule should also include an indication that in judging whether the material is patently offensive, it must be judged within the context of the whole program and the merit of the work. The Commission has recognized this approach in the broadcast area.[4] Any reluctance to give the merit of the work significant weight in the determination of indecency in the broadcast area should not impede such an approach in the cable medium.

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[3](...continued)
medium,' indecency will be judged by the standard of an average broadcast viewer or listener.") (footnotes omitted)

[4] *See Infinity*, 3 F.C.C. Rcd. at 932:

> "16. As we stated in our April rulings, and as we re-emphasize today, the question of whether material is patently offensive requires careful consideration of context. The Supreme Court has said that the term 'context' encompasses a 'host of variables'. These variables, whose interplay will vary depending on the facts presented, include, as the Court noted, an examination of the actual words or depictions in context to see if they are, for example, 'vulgar' or 'shocking,' a review of the manner in which the language or depictions are portrayed, an analysis of whether allegedly offensive material is isolated or fleeting, a consideration of the ability of the medium of expression to separate adults from children, and a determination of the presence of children in the audience.
>
> "17. The merit of a work is also one of the many variables that make up a work's 'context,' as the Court implicitly recognized in *Pacifica* when it contrasted the Carlin monologue to Elizabethan comedies and works of Chaucer. But merit is simply one of many variables, and it would give this particular variable undue importance if we were to single it out for greater weight or attention than we give other variables. We decline to do so in deciding the three cases before us. We must, therefore, reject an approach that would hold that if a work has merit, it is *per se* not indecent. At the same time, we must reject the notion that a work's 'context' can be reviewed in a manner that artificially excludes merit from the host of variables that ordinarily comprise context." (footnotes omitted)

There are good reasons to adopt for cable television a definition of "indecent" more narrow than those developed by the Commission for application to broadcast programming and telephonic communications. Cable television is not freely available like broadcast television or radio, viewers have affirmatively to subscribe to get it and cable television lends itself well to opt-out mechanisms such as lock box devices and signal scrambling.[5]

Therefore, TWE respectfully submits that subpart(a) of the proposed rule read:

> "(a) A cable operator may enforce prospectively a written and published policy of prohibiting on leased access channels programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs, in a patently offensive manner, as measured by contemporary community standards for the cable medium, and when judged in the context of the entire program, including the program's overall merit."

B. Blocking of Indecent Programming

Section 10(b) requires cable operators to place on a "single channel" all indecent commercial use programming and then to block that channel. Congress' clear intention in passing this provision was to limit children's access to indecent programming, and not necessarily to limit the amount of indecent programming that a cable system could carry to that which may fit on one channel. The Commission, therefore, should make clear that cable operators may, if they choose, place indecent commercial use

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[5] There are authorities rejecting as unconstitutional on grounds such as those stated in the text the extension to cable television of overbroad definitions of indecent programming. *See, e.g., Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *see also Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1453-54 (D.C. Cir. 1985), *cert. denied*, 476 U.S. 1169 (1986); *Cox Cable Communications, Inc. v. United States*, 774 F. Supp. 633, 636-37 (M.D. Ga. 1991) (tending to extend to cable television the robust First Amendment protection accorded to the print media).

programming on more than one channel as long as any channel that in designated for indecent programming is blocked.

To block a channel designated for indecent programming requires certain technical adjustments that will vary from system to system depending on a system's technological development. Because of the differences in system technologies that exist, the choice of the mechanism to accomplish blocking should be left to the cable operator. In addition, because the blocking will generate potentially burdensome technical and administrative expenses, cable operators should be allowed to recoup these expenses from either subscribers or program providers.

Even in systems that are fully addressable, and which can thereby block channels by the relatively straight-forward approach of scrambling the signal, it will take time to make the necessary technical adjustments and to permit the operator to notify subscribers if it wishes. Moreover, certain local authorities require advance notice before an operator can make certain changes to its service or programming.[6] Operators will need sufficient lead time to put in place the blocked channel. Therefore, TWE proposes that operators with addressable systems have at least 180 days from the effective date of the rule to comply.

As recognized by the Commission, to date the problem of blocking programming not desired by the subscribers has been addressed by supplying a locking device to subscribers, pursuant to Section 624(d)(2)(A) of the 1984 Cable Act (47 U.S.C. § 544(d)(2)(A)). There has been no showing that these locking devices have been ineffective in keeping indecent programming from children. With this mechanism available, and to accommodate the technological problems, the rule should permit systems that are

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[6] *See, e.g.*, New York Executive Law § 824-a(1) (1992) ("Every cable television company shall notify the [state] commission of any network change or significant programming change no later than the later occurring of forty-five days prior to the network change or significant programming change or five business days after the cable television company first knows of such change.").

not fully addressable to be in compliance within 10 years from the effective date of the rule.[7]

Additionally, in certain areas channel capacity constraints may result in indecent programming being cablecast on the same channel as non-indecent programming. On other systems where there is little indecent programming, the operator may prefer not to devote an entire channel to such programming to avoid leaving large blocks of fallow time on the channel. Therefore, the rule should make clear that the channel need be blocked only during the times indecent programming is being carried. If operators cannot have this leeway, producers of non-indecent programming may well have difficulties selling advertising since such programming will be viewed only by those interested enough to request access to the channel. Moreover, certain providers of non-indecent programming may not want time adjacent or near to indecent programming. These circumstances make it important that the system operator also be able to limit the time periods during which indecent programming may be cablecast, so as not to interfere with non-indecent programming and to minimize the blocking and unblocking of the signal during the day. Such restrictions are consistent with the power granted to the operator by Section 10(a) to bar *all* indecent programming if it so chooses.

Similarly, in certain systems, such as TWCNY's Manhattan system, more than one programmer may request a particular time slot and want to cablecast indecent programming in that slot. If the operator has provided only a single blocked channel for indecent programming,[8] the rules should permit the operator to choose one programmer over the other for cablecast on that single channel without facing the possibility of having to defend against an action for denial of access under Section 612(d) or (e)(1) of the 1984

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[7] This is similar to the 10-year delayed compliance date with the buy through prohibitions in § 3(b)(8)(B) of the 1992 Cable Act.

[8] Since, as noted above, an operator may bar all indecent programming, it surely may not be required to offer additional channels for indecent leased access programming above what it has voluntarily chosen to provide.

Cable Act (47 U.S.C. § 532(d) or (e)(1)), or for denial of access or imposing unreasonable terms and conditions of carriage by relegating one producer to an allegedly less desirable time slot on the channel.[9]

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[9] Subsections (d) and (e)(1) of § 612 provide as follows:

"(d) Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available for use pursuant to this section may bring an action in the district court of the United States for the judicial district in which the cable system is located to compel that such capacity be made available. If the court finds that the channel capacity sought by such person has not been made available in accordance with this section, or finds that the price, terms, or conditions established by the cable operator are unreasonable, the court may order such system to make available to such person the channel capacity sought, and further determine the appropriate price, terms, or conditions for such use consistent with subsection (c), and may award actual damages if it deems such relief appropriate. In any such action, the court shall not consider any price, term or condition established between an operator and an affiliate for comparable services.

"(e)(1) Any person aggrieved by the failure or refusal of a cable operator to make channel capacity available pursuant to this section may petition the Commission for relief under this subsection upon a showing of prior adjudicated violations of this section. Records of previous adjudications resulting in a court determination that the operator has violated this section shall be considered as sufficient for the showing necessary under this subsection. If the Commission finds that the channel capacity sought by such person has not been made available in accordance with this section, or that the price, terms, or conditions established by such system are unreasonable under subsection (c), the Commission shall, by rule or order, require such operator to make available such channel capacity under price, terms, and conditions consistent with subsection (c)."

Therefore, TWE respectfully suggests that subpart (b) of the proposed rule read as follows:

" (b) All programs intended for carriage on channels designated for commercial leased access use under this section and identified by the program provider as indecent shall be placed on one or more channels designated by the cable operator for indecent programming, except for such programs prohibited by the cable operator pursuant to paragraph (a) above. A cable operator shall block any such channel at least during the times when indecent programming is being carried except for subscribers requesting access to such channel in writing. The cable operator may group time slots to be made available for indecent programming in order to facilitate the administration and the sale of time on these channels without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2).

(1) For cable systems that are fully addressable, this paragraph (b) is effective 10 days after publication in the Federal Register.

(2) For cable systems that are not fully addressable, this paragraph (b) shall not apply until the earlier of:

(A)the time at which the cable system is fully addressable; or

(B) 10 years after the effective date of this rule.

(3) In those circumstances where the time requested by the program provider is already under contract, the cable operator shall offer the program provider time available on the channel as close as possible to the time requested. If no other time is available, the cable operator is entitled to refuse to carry the programming on its system until capacity is available for indecent programming, upon further application by the program provider.

(4) In those circumstances where two or more program providers request the same time period on a channel designated for indecent programming, the cable operator can select which

program provider will program that time period without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2)."

C. Program Provider Must Give Notice By Certification

Section 10(b) of the 1992 Act requires that program providers notify the cable operator regarding indecent programming they intend to offer in order to trigger the operator's obligations to restrict access to such programming. It is essential, to protect the cable operator from undeserved liability, that the rules require that this notice be clearly set forth in writing and timely and that the cable operator be able to rely on it. In cable systems such as TWCNY's Manhattan system as an example, to date most indecent programming has been contained in series programming where the program provider contracts for time (in ½-hour, hour or larger blocks of time on one or more specific days each week) for periods of from 13 weeks to as long as 18 months.[10] Once the time has been contracted for, the program usually is cablecast on a specific channel for the duration of the contract. Programmers should not be permitted to change their minds during the contract period and give notice of intention to submit indecent programming thereby requiring a possible change in channel placement of their programming. Although in Manhattan most contracts permit the system to relocate the program, such moves are disruptive for subscribers and costly to the operator, and while sometimes necessary, are usually avoided. Therefore, if a series program provider is able to insert and give notice of indecent programming within the series term whenever it desires, and the series is not already on the blocked channel, there could be serious administrative, scheduling and expense burdens on the operator.

To address these issues, the rule should permit the operator to require each leased access program provider to give the statutory

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[10] While these programmers lease time at a specified price, as the legislative history makes clear, the form of transaction for purchasing the time is not limited to a lease, but can include "fees per subscriber, profit sharing or any combination of these arrangements". 130 Cong. Rec. H12239 (daily ed. Oct. 11, 1984) (statement of Rep. Wirth).

notice at the time it contracts for time on the system in the form of a certification that the program provider will not include obscene material and either plans to include indecent material or will not include indecent material in its programming for the duration of the contract period.[11]

As part of the Commission's rules it should be made clear that the operator's insistence upon the certification cannot form the basis for an action by the programmer under Section 612(d) or (e). Moreover, once a blocked channel is filled, the operator should be able to require this certification to avoid any administrative problems should an indecent program be submitted and cablecast by a program provider not on a blocked channel. As it is, operators, having been deprived of their immunity from liability for obscene programming on leased access and PEG channels while being forced to put on programming they would not choose in the first place, are already dealing with an intolerable burden.

Additionally, the proposed rule requires the statutory notice be given "no later than seven days prior to the requested carriage". This time minimum of advance notice is relevant primarily for programmers obtaining only a one-time slot on the blocked channel since series programmers will have given notice in their on-going contracts. Since in certain systems accommodating indecent programming may require changes in schedules, sufficient flexibility in the notice period should be given to permit these changes to be accommodated within the normal scheduling time frame and to be reflected in any guides offered by the system to subscribers that list the programming at issue. Some cable guides present schedules for a week's worth of programming, which are typically prepared two weeks in advance and some present schedules for a month's worth of programming, some of which must be prepared two months in advance.[12] Because individual

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[11] This is true if the programmer contracts only for a one-time slot or contracts for a series of time slots.

[12] For example, TWCNY's pay-per-view programming line-up must be prepared two months in advance. In practice, this means, for example, that the November line-up must begin production on September 1.

cable systems will need different lengths of prior notice, the rule should make clear that cable operators are allowed to require that notice (in the form of the required certification) be given a reasonable amount of time prior to the requested carriage, depending on their individual needs.

The notice should be required to be in writing to avoid later confusion or unnecessary disputes. Retention of these notices should be for a period of 18 months which is consistent with other similar record retention requirements in the cable area.[13]

The Commission also has asked whether the operator should be held harmless from liability if it does not receive timely notice from the program provider. Since the cable operator is already immune from civil and criminal liability for indecent programming cablecast on leased access channels (47 U.S.C. § 558), TWE assumes this concern relates to possible sanctions by the Commission for a violation of this new rule.

The operator should be held harmless in those circumstances because without such assurance, cable operators might feel compelled to prescreen all or portions of leased access programming to try to insure that no indecent programming is included — a task that is expensive, far from easy and has proven troublesome even for justices of the Supreme Court. The burden and expense of such prescreening outweighs whatever additional comfort that might give to the Commission that indecent programming would not inadvertently be made available. Indeed, leased access programming may be delivered live or by satellite feed instead of by presubmitted videocassette making notice even more critical. Moreover, failure to provide this immunity would be inconsistent with the objective of the statute to place the burden in this area squarely on the program provider.

Finally, the Commission should specifically authorize the cable operators to require indemnity from program providers for breach of their notice or certification obligations. If program providers

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[13] *See* 47 C.F.R. § 76.225(c) (1991) (Commercial Limits in Children's Programs); 47 U.S.C. § 503(b)(6)(B).

breach their certifications, cable operators, through no fault of their own, could suffer both liability and legal expense. Accordingly, that expense should be placed on the party at fault — the program provider that breached its representations.

TWE respectfully proposes that subpart (c) be modified and supplemented as follows:

> "(c) Cable operators are authorized to require program providers on leased access channels that lease or otherwise contract for time to certify to cable operators, a reasonable time prior to cablecast determined by the cable operators, that they plan to include indecent material as defined in paragraph (a) above in their programming or that they will not include any indecent material as defined in paragraph (a) above in their programming for the duration of the lease or contract period. Cable operators are also authorized to require program providers to certify in their contracts that they will not include obscene material in their programming. Such certification can be required to be in the contract for time or in some other available manner, at the cable operators' discretion. Cable operators are also authorized to require program providers to indemnify cable operators completely for any liability or expense the cable operators may incur in relation to the programming submitted for cablecast.
>
> "(d) The failure to limit indecent programming to a blocked channel as required by this rule shall not subject the cable operator to sanction by the Commission unless it is demonstrated that the operator had received the required written notice from the program provider in a timely fashion."

II. Proposed Rules Regarding Public, Educational and Governmental Access Channels.

Section 10(c) of the 1992 Cable Act directs the Commission to promulgate regulations that enable cable operators to prohibit on PEG channels programming that "contains obscene material, sexually explicit conduct, or material soliciting or promoting

unlawful conduct". As was stated in the NPRM, Section 10(c) does not require cable operators to prohibit such programming, it simply makes clear that cable operators have the right to do so if they choose.

The proposed rule, however, needs certain clarifications. *First*, the rule fails to recognize that many PEG channels are not administered by cable systems, but instead are administered by an agency of the local government or a community access organization. For example, in Erie, Pennsylvania, a Public Access Authority, established by the City Council pursuant to State legislation, completely administers public access channels; in Indianapolis, Indiana, a Citizens Advisory Committee, established by franchise, consults regarding appropriate programming on PEG channels; and in Austin, Texas, Austin Community Television Inc. completely administers three public access channels.[14] The proposed rule, therefore, should be amended in its reference to "[a] cable operator" to refer instead to "[a] cable operator or organization, designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system".

Second, the NPRM recognizes (p. 6 n.11) the congressional intent that "sexually explicit" as used in Section 10(c) should be interpreted to mean "indecent" as used with respect to the leased access restrictions. The proposed rule, however, uses the "sexually explicit" term. Not all sexually explicit programming is indecent. To avoid any confusion, TWE proposes that the rule use "indecent" as defined in the leased access rules instead of the term "sexually explicit".[15]

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[14] In addition to these three public access channels, Austin also has one educational channel administered by a local community college, two educational channels administered by a local school district, one governmental channel administered by the county and one governmental channel administered by the City of Austin.

[15] The use of terminology in this area is difficult and important and one's ability to understand it is not made easier by the language of the Cable

(continued...)

Third, the rule should reflect, as the NPRM recognizes, that a cable operator or local access organization may enforce its policy of prohibiting the defined programming by requiring certification by PEG users, in their contracts for PEG access or otherwise, that their programming does not fit into any of the rule's three defined categories. This approach promotes Congress' intent. Just prior to Section 10(c)'s passage, Senator Wirth, the original author of the PEG provisions, stated that through Section 10(c) Congress would "give a very clear signal to the cable companies that, in fact, they can police their own systems". 138 Cong. Rec. S 650 (daily ed Jan. 30, 1992).

Such certification is also justified as a means for cable operators to balance their power under the rule on the one hand, and the 1984 Cable Act's prohibition on cable operators exercising "any editorial control over any public, educational, or governmental use of channel capacity" on the other hand. *See* Section 611(e) (47 U.S.C. § 531(e)). By requiring a certification from PEG programmers, Congress' purpose is served with less intrusion by the cable operator. Ancillary to permitting such certification, the Commission should make clear that cable operators and local access organizations can require indemnity from program providers (including governments and local access organizations acting as program providers) for breach of the certification. Cable operators need this specification in the rule to indicate that such indemnity provisions do not constitute the exercise of editorial control.[16]

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[15](...continued)
Act. For example, note 3 of the NPRM states that Section 15 "relates to the provision of unsolicited sexually explicit programs on 'premium channels'". However, the statute's text only refers to programming that has been rated R, NC-17 or X by the Motion Picture Association of America, and the R rating is not equivalent to "sexually explicit" or "indecent" material. An R rating may be bestowed on a film for "hard language, or tough violence, or nudity within sensual scenes, or drug abuse". Jack Valenti, The Voluntary Movie Rating System 9 (1991).

[16] In actions brought by the producers of adult programs on a leased access channel against TWCNY, the plaintiffs claim that representations

(continued...)

Local access organizations as well may need such indemnification since they may not have immunity for actions they take regarding the channels they administer.[17]

Fourth, the NPRM recognizes that procedures need to be developed to govern disputes between the cable operators and PEG programmers and indicates the Commission's inclination to leave those disputes to be handled at the local level. While TWE agrees with that approach, it suggests that certain limits be put on such local power. As discussed above with respect to leased access, cable operators must be able to rely on the certification of the program providers. However, in some instances, an operator may in good faith come to the conclusion that the certification is inaccurate. Accordingly, when a programmer certifies that its programming does not contain any of the defined material, yet the cable operator finds that it does, the cable operator's finding should have a presumption of validity. Moreover, programming which the cable operator determines should be prohibited from cablecast under the rule need not be cablecast until the programmer challenges the cable operator's decision and successfully proves that it does not fall within a prohibited category. Finally, cable operators should be given the right to obtain an assurance from the local franchise authority that if the operators reasonably and in good faith determine that PEG programming falls within a prohibited category, they will not be held liable by the local franchise authority for

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[16](...continued)
and warranties clauses and indemnification clauses in contracts are unreasonable in part because they constitute the exercise of editorial control by the operator. *Media Ranch, Inc. v. Manhattan Cable Television, Inc.*, No. 90 Civ. 7218 (S.D.N.Y. filed Nov. 9, 1990); *Gay Cable Network, Inc. v. Manhattan Cable Television, Inc.*, No. 91 Civ. 7450 (S.D.N.Y. filed Nov. 1, 1991).

[17] Furthermore, the Commission should make clear that cable operators can require indemnity from a local access organization or franchise authority that requires cable operators to carry programming from which they may incur liability.

breaching an obligation under their franchises to provide PEG programming.

TWE respectfully submits that the proposed rules regarding PEG programming should read as follows:

> "(e) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system may prohibit the use of any channel capacity on such facilities for any programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct."

> "(f) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system are authorized to require that public, educational or governmental program providers (including governments or access organizations acting as program providers) (1) certify, by contract or otherwise, that they will not submit programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct, and (2) agree that they will indemnify the cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system for any liability or expense they may incur in relation to the programming."

> "(g) In any dispute brought under paragraphs (e) or (f), there shall be a presumption that the findings of the cable operator regarding programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct are reasonable and in good faith unless shown by clear and convincing evidence to the contrary. Any programming that the cable operator, or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system, determines to contain obscene material, indecent material as defined in paragraph (a) above,

or material soliciting or promoting unlawful conduct shall not be cablecast until the program provider challenges that determination and there is a final decision by a competent authority that the programming does not fall within one of the prohibited categories set out in paragraph (f)."

"(h) Cable operators are authorized to require local governments or access organizations to indemnify them completely for any liability or expense the cable operators incur as a result of indecent programming being carried on their systems which the local governments or access organizations control."

"(i) A cable operator is authorized to require a franchising authority to provide its assurance that it will not hold the cable operator liable for breaching an obligation under its franchise to provide public, educational and governmental programming if the cable operator in good faith withholds programming because it finds it to be within one of the prohibited categories set out in paragraph (f)."

III. Obscene Programming on Leased Access and PEG Channels.

Congress in amending Section 612(h) of the 1984 Cable Act appears to provide coextensive power in both the cable operator and the local franchise authority to prohibit programming that is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States". Section 612(h), as amended, is inartfully drafted and creates the possibility of situations where the local franchise authority determines that certain programming violates Section 612(h) while the cable operator does not believe that the programming violates Section 612(h). If in fact the franchise authority can order the cable operator not to cablecast such programming, then the cable operator faces possible action against it by the program provider pursuant to 47 U.S.C. Section 532(d) or (e)(1). Therefore, the Commission should authorize the cable operator to require an indemnification from the local franchise authority concerning any liability or expense incurred by the

operator because of the action by the franchise authority prohibiting programming from the leased access channels.

With particular reference to "obscene" programming, Congress has opened up cable operators to liability for cablecasting such programming. *See* 1992 Cable Act § 10(d). This liability, however, places a very high price on the difficult and complicated decision that cable operators must make regarding the ever-troubling question of what is obscene. If a cable operator labors over whether certain material is obscene and in the end decides that it is not, that cable operator, even though it in good faith allowed the material to be cablecast, is nevertheless subject to possible criminal and civil liability regarding programming it did not voluntarily choose to cablecast in the first place. In order to alleviate the unfair exposure that the cable operator now faces if it cablecasts a leased or PEG program that is later determined to be obscene, the Commission should provide the cable operator immunity from state and local law for the cablecast of any obscene programming on leased access or PEG channels.

TWE respectfully submits that the proposed rules be supplemented with the following:

"(j) Cable operators are authorized to require local franchise authorities to indemnify them completely for any liability or expense the cable operators incur as a result of the franchise authorities prohibiting the cable operators from cablecasting programming pursuant to 47 U.S.C. § 532(h)."

"(k) Cable operators shall not incur any liability under state or local law for any program that involves obscene material which is carried on any channel designated for public, educational, or governmental use or on any other channel obtained under 47 U.S.C. § 532 or under similar arrangements."

Conclusion

With the understanding that TWE has taken a position against its cable systems being forced to carry leased access and PEG programming, TWE has appended hereto recommended rules to implement Section 10 of the 1992 Cable Act and respectfully submits them for the Commission's adoption.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.

/s/
Stuart W. Gold

Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000
Its Attorneys.

December 7, 1992

Virginia B. Bogue Letterhead

December 4, 1992

VIA FEDERAL EXPRESS

Alfred C. Sikes - Chairman
Federal Communications Commission
1919 M. Street, N.W.
Washington, D.C. 30554

Re: Public Access Programming

Dear Chairman Sikes:

I am writing to you because I have recently become aware of and alarmed about sexually explicit adult programming cable cast on my public access cable channel. I live in Tampa, Florida and I am an attorney as well as a wife and mother. My public access channel is channel 12, situated between ABC on Channel 10 and CBS on Channel 13. While switching channels one evening, I saw scenes that I couldn't believe were on at all, but especially during prime time. Totally nude women were pole dancing and lap dancing, squatting and gyrating so that their genitals were in full view. I have since seen a tape of a totally naked man dancing and screaming obscenities and have become aware that such programming is even shown on Saturday mornings. I am concerned about the negative effect of such programming on our children.

David Elkind, Professor of Child Development at Tufts University, has this to say about the effect of nudity on television on our children:

> "In what I call the postmodern family," he says, "we have this new image of the child as competent and sophisticated. Adults have this perception that children can handle all this stuff. . . But I disagree. I think children find it most

disturbing, hurtful and damaging. Any they wonder, Why am I being allowed to see this? Why isn't anyone saying, Kids don't need to see this stuff. Why isn't anyone looking out for my interest?" *Newsweek*, November 2, 1992.

A friend, Amy Lerom and I have spoken with Tampa Mayor Sandra Freedman, the Chairman of the City Council Joe Greco, made a presentation to our Local Cable Advisory Committee and the Hillsborough County Commission. Everyone says there is little they can do to limit or regulate this adult programming. Tapes have been presented to the State Attorney's Office and were not considered criminally obscene. As an attorney, I understand that this material, unless adjudged obscene by a court of law, is protected by the First Amendment. Therefore, Mrs. Lerom and I are presenting three proposals that we feel are the least restrictive ways to achieve a balance between the interest of our children and the interest of free speech.

We are not asking that sexually explicit/indecent material be banned or that its contents be changed or censored in any way. We are asking that it be made available at a time and in a manner so that it is accessible to adults but not children. These recommendations are set forth in the enclosed Comments to Proposed Rule Making.

We, as parents, need this commission to help us protect our children by adding these three *logical* and *simple* recommendations to the existing FCC Regulations.

I urge the FCC to promulgate rules regulating adult programming on public access cable channels.

Sincerely,

By:_____/s/_____
Virginia B. Bogue

By:_____/s/_____
Amy Lerom

FCC Caption Omitted

COMMENTS TO PROPOSED RULE MAKING

We are concerned about children being exposed to sexually explicit/indecent programming on PEG channels.

Section 10 of the Cable Act of 1992 allows the cable operator the option of prohibiting sexually explicit/indecent programming on Public, Educational and Governmental Access Channels. However, if the cable operator opts to allow or continue sexually explicit/indecent programming, there are *no* provisions provided to regulate the time or manner in which sexually explicit programming is presented. Cable operators are liable only for programming which reaches the level of obscenity.

Therefore, we urge the Commission to adopt the following rules to regulate sexually explicit/indecent programming on cable PEG channels:

1. Move the public access channel to channel 50 or above so that it is less likely for children to unintentionally be exposed to adult content.

2. Require all sexually explicit/indecent programming to be shown only after midnight and before 6:00 a.m. so that it will be less accessible to teenagers and children.

3. Cable operators providing PEG channels must provide:

   (a) Written notification at time of cable subscription informing the subscriber of adult programming on designated channels and of the subscriber's option to lock out these channels free of charge.

   (b) Notification of adult programming and free lockout on monthly billing statements, including a phone number which can be called to lock out channels immediately.

4. For the purpose of Section 10, sexually explicit/indecent material shall be defined as including, but not limited to, the following:

Frontal nudity, nude dancing, sado-masochistic behavior, excretory activities, exposed genitals and fondling.

5. Interpretation of "sexually explicit/indecent" shall be made by Local Cable Advisory Committees.

/s/
Virginia B. Bogue
2625 Jetton Avenue
Tampa, Florida 33629
(813) 253-0831

/s/
Amy Lerom
816 South Poinsettia Drive
Tampa, Florida 33629
(813) 872-6865

City of Tampa, Office of Cable Communication
Letterhead

FCC Caption Omitted

COMMENTS ON PROPOSED RULE MAKING
Adopted November 5, 1992: Released: November 10, 1992

Comments Date: December 7, 1992

By: City of Tampa
Office of Cable Communication
306 East Jackson Street
Tampa, Florida 33602

Attention: John M. McGrath, Operations Improvement Administrator

Background:

The City of Tampa, a political subdivision of the State of Florida, is located on the west coast of the state.

The City of Tampa (125 square miles) is served by Jones Intercable Venture Fund 12 (B, C, D), a 60 channel system offering a 47 channel basic cable service package to approximately 55,000 subscribers.

The City of Tampa has within the last few years seen a marked increase in programming on its Public Access channels. Some of this increased programming is perceived by many of the City's residents to be vulgar, obscene, and a detrimental influence on minors. The programs in controversy have included visual depiction of male and female nudity, including but not limited to,

genitalia, simulated sexual activity, and/or sexually related physical contact between performers and audience members, profanity, alleged drug and alcohol abuse as well as acts of masochism and violence.

Tapes containing examples of the above referenced activity has been referred to the local State Attorney's Office for possible criminal prosecution under the State of Florida's obscenity statutes. This Office has to date not yet initiated prosecution. It is perceived at this point in time that while many of the activities involved may be "indecent" they may not necessarily rise to the level of obscenity set forth in the state statutes.

The City, as a result, finds itself severely restricted in its efforts to be responsive to those members of the community who object to the availability of the programming in question. Clarification of the 1992 Cable Act's provisions contained in this proposed rule making are, therefore, of paramount importance to the City of Tampa. Towards that end, we submit the following comments:

INTRODUCTION

1. N/A

2. Liability to cable operations for access programming should be extended to include not only obscene programming but also those areas of speech otherwise protected by the Constitution as well. The current amendment will, however, encourage the cable operator to join with the local franchising authority in taking affirmative steps to preclude the transmission of obscene programming.

3. N/A

LEASED ACCESS CHANNELS: VOLUNTARY PROHIBITION BY CABLE OPERATORS

4. The language of Section 10, amending Section 612(h), providing the cable operators the discretion to exclude any programming it "reasonably believes" to be indecent seems inconsistent with the mandatory language included in subsection (j) aimed at limiting the access of children to

indecent programming.

What, for example, happens in the situation where the cable operator has chosen of to do a written policy prohibiting such programming on leased access and a program qualifying under the proposed indecency standard is submitted?

If the program is not otherwise prohibited, where should the program in question be shown, on the cable operator's regular leased access channel or on the separate blocked leased access channel mandated by the language of Section 612?

While it can reasonably be anticipated that this area may be subject to a prior restraint challenge, it is recommended that the cable operator be required to make an election via written policy, (to be filed with the franchising authority), which precludes all indecent programs outright or follows the specific guidelines for blocked leased access set forth in Section 612(j). This recommendation will avoid the enforcement problem described above.

LEASED ACCESS CHANNELS — INDECENT MATERIAL REQUIRED TO BE BLOCKED

5. The City of Tampa supports the specific provision set forth in this Section with the following clarification: that these provisions requiring a blocked leased access channel and programmer disclosure of indecent content are deemed binding on all cable operators except in those instances where a written policy completely precluding such programming is provided.

6. The City of Tampa supports the adoption of a definition of indecency which incorporates the language applied in the telephone and broadcast medium.

7. The City of Tampa supports the adoption of a "community standards" test unique to the medium of cable television.

8. The blocking approach described in Section 10 as opposed to the "safe harbor" approach (programming within specified

hours) currently applied in broadcast medium is beneficial from an enforcement standpoint. To protect all parties involved, the City of Tampa recommends: (a) the leased access channel on which indecent programming is allowed be audio and visually scrambled; (b) a signed subscriber release be required prior to unscrambling; and, (c) the lock-box option be continued even for those subscribers requesting scrambled leased access channels.

9. The City of Tampa supports limiting children's exposure to indecent programming on leased access channels. The recommendations discussed in paragraph 8, above, would also apply to this issue as well. In addition, program providers should also be required to sign an affidavit affirming that the program in question is not indecent as defined under the cable medium's "community standards" test and acknowledging that the provider not the cable operator is solely responsible for programs aired in violation of said agreement.

10. The City of Tampa does not agree with the interpretation included. Pursuant to the language contained in Section 612(h), the cable operator is granted the discretion to prohibit that programming it "reasonably believes" to be indecent. The City would agree that the language of Section 10 would suggest that the cable operator as well as the program provider would have an obligation to put such programming on a blocked lease access channel unless the transmission of such programming is specifically prohibited pursuant to a cable operator's written policy.

11. The City of Tampa supports mandatory certification provided by the program provider to the cable operator prior to airing that the program in question does not qualify as obscene or indecent under the definition to be hereinafter established. A uniform application of such a certification requirement would be less restrictive and seemingly more content neutral as intended by the language of Section 612(c)(2).

12. The City of Tampa recommends the following time frames

for the provision of adequate notice regarding program content:

(a) seven (7) days notice for pre-produced programs; and,

(b) three (3) days notice for live programs.

(c) If written certification is not received by air date, the program in question is not aired. Absent exigent circumstances defined at the local level, the program provider will not be entitled to a refund of fees assessed for air time.

(d) The cable operator in coordination with the program provider will also have the discretion to air another previously certified program.

(e) Program certification should be retained for the term of the franchise or some other mutually agreed upon time period.

PEG CHANNELS - CABLE OPERATOR-IMPOSED PROHIBITIONS ON CERTAIN TYPES OF PROGRAMMING

13. The City of Tampa recommends:

(a) further clarification of the linkage between the "sexually explicit conduct" referred to in Section 10 for PEG channels and the definition of "indecent" programming developed for leased access channels;

(b) making mandatory the adoption by cable operators of a written policy either completely prohibiting "programming which contains obscene material, sexually explicit conduct or material soliciting or promoting unlawful conduct", or authorizing its transmission under certain limited circumstances such as allowing "indecent" programming to be placed on either a separate public or leased access channel under the same conditions set forth in Section 612(j); and,

(c) the limiting of cable operator control over PEG Access programming to public access only, except in those instances where the cable operator is specifically required to program

the government and educational access channels as well.

14. The City of Tampa supports codifying the new statutory provisions and specifically those related to programmer certification of program content. On the issue of conflicts between cable operators and programmers, a local based method of penalties and dispute resolution is recommended. A suggested grievance procedure might include the following steps:

(a) initial review of complaint by cable operator;

(b) the referral of unresolved disputes to a citizen advisory committee authorized to act in such a capacity;

(c) further review by franchising authority if a resolution cannot be reached; and,

(d) the judicial process.

15. N/A

16. N/A

17. N/A

18. N/A

Cover Omitted

Table of Contents Omitted

FCC Caption Omitted

JOINT REPLY COMMENTS OF THE ALLIANCE FOR COMMUNITY MEDIA, THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY, THE AMERICAN CIVIL LIBERTIES UNION AND PEOPLE FOR THE AMERICAN WAY

INTRODUCTION

The Opening Comments of the Alliance for Community Media (formerly the National Federation of Local Cable Programmers), the Alliance for Communications Democracy, the American Civil Liberties Union and People for the American Way demonstrated many of the ways that Section 10 and the Commission's Proposed Rule are unconstitutional. Various other comments — of both operators and programmers — have similarly pointed out the serious constitutional defects of this system of content-based restrictions.[1] Moreover, a number of comments have recognized

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[1] These constitutional defects have been recognized by operators and owners of cable systems and their trade associations, see, *e.g.*, Blade Communications, Inc. *et al.*, at 2; Community Antenna Television Association, Inc., at 2-3; Cox Cable Communications, at 2, 4, 14; InterMedia Partners, at 8-9; National Cable Television Association, Inc., (continued...)

the utility of lockboxes in achieving Section 10's ostensible goal — protecting children from programming that their parents find inappropriate.[2] Because this type of content-based regulation of protected expression must use the least restrictive means, see *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989), any mechanism more restrictive than lockboxes, such as the Proposed Rule's regulatory scheme, fails to pass constitutional muster.

We continue to adhere to our original position that the Commission has embarked on a course to promulgate an unconstitutional final rule. However, there are serious problems with many of the suggestions put forward by several other commenters — primarily cable operators — allegedly to minimize the unconstitutional effects that they would feel from the Commission's Proposed Rule. While these operators make a host of suggestions for their own economic or regulatory benefit, their proposals would only exacerbate the burdens placed on

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[1](...continued)
at 3-6, as well as programmers and access centers, see, *e.g.*, Ann Arbor Community Access Television, at 1; Boston Community Access and Programming Foundation, at 3-6; Roxie Lee Cole, at 1; Columbia Community Access, at 1; Community Access Network, Inc., at 1; Judy D. Crandall, at 1; Defiance Community Television, at 1; Denver Area Educational Telecommunications Consortium, Inc., at 5 n.7; David B. Dreety, at 1; Steven C. Fortriede, at 1; Manhattan Neighborhood Network, at 2-3; Erik S. Mollberg, at 1; Waycross Community Television, at 1.

[2] Blade Communications, Inc. *et al.*, at 8; Boston Community Access and Programming Foundation, at 5 (noting that lockboxes provide a less restrictive means of protecting children from indecent programming); Community Antenna Television Association, Inc., at 6-7; Local Governments, at 7; Telecommunications, Inc., at 14 (arguing in favor of lockboxes as a permissible alternative to operator blocking); Time Warner Entertainment Co., L.P., at 10.

programmers' free speech rights, as we discuss in the separate argument sections presented below.

Before examining each of these arguments, we note that several operators have also advanced a different kind of constitutional argument that is seriously in error. For example, Time Warner in both its comments and in separate litigation (*Time Warner Entertainment Co., L.P., v. FCC*, Civil Action No. 92-2494 (D.D.C. filed Nov. 5, 1992)) argues that it is unconstitutional to require operators to carry access channels because they are thereby associated with messages with which they do not agree.[3] This argument is necessarily predicated on the notion that, with respect to access channels, cable operators are editors with their own first amendment rights. However, because courts recogni[illegible] PEG and leased access channels as a public forum, they have explicitly distinguished access from other cable channels and rejected the contention that operators are editors with their own first amendment rights with respect to access channels. See cases cited in Opening Comments at 36 & n.16.

These operators' erroneous constitutional analysis leads them into misreading Section 10 and offering several highly inappropriate suggestions to the Commission. Because they view themselves as editors of access channels, many operators have forwarded suggestions that would use Section 10 to overwhelm Congress' general intent to preserve access channels as a public forum.[4]

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[3] For other comments arguing that PEG and leased access is itself unconstitutional, see Blade Communications, Inc. *et al.*, at 1-2; Community Antenna Television Association, Inc., at 2-3; National Cable Television Association, Inc., at 3-4 & n-3; Tele-Communications, Inc., at 2.

[4] Perhaps like Time Warner (who advances such an argument in their lawsuit), these operators hope that the result will be that some court will look to the Commission's final rule to find, first, that the newly heightened level of operators' editorial involvement grants them heretofore unrecognized first amendment rights and, second, that those rights are violated by the requirement that operators must carry access programming.
(continued...)

Section 10, however, contains only a narrow exception to the general requirement that speech on PEG and leased access channels remain unedited. While Congress enacted that part of the 1992 Act to afford the Commission a highly limited basis to address sexually explicit or politically controversial speech, it left intact the general command that "a cable operator shall not exercise *any* editorial control over" PEG or leased access. 47 U.S.C. § 531(e) (PEG; emphasis supplied); 47 U.S.C. § 532(c)(2) (leased access; emphasis supplied). While operators may choose to ignore these general provisions, they remain in force, and the Commission must interpret Section 10 so that it is consistent with the prohibition against operator editing. Thus, the Commission cannot assign to operators the task of defining what material a programmer may not air over a cable system's PEG and leased accessed channels. Rather, it must limit the operator of that system to exercising an option to prohibit programmers from airing that material. Similarly, the Commission must also vest the power to police these channels in an entity other than the operator, whom Congress has forbidden from "exercis[ing] *any* editorial control." Rather, as we pointed out in our Opening Comments (at 58-60), prior restraints are the exclusive domain of the courts. See generally *Freedman v. Maryland*, 380 U.S. 51 (1965).

This construction of the statute is also mandated by the constraints of the constitution. Even under a view that attempts to gain for operators an unprecedented first amendment right to edit access programming, it remains unconstitutional for the government to lodge censorship authority in operators who may then be subjected to liability if they fail to exercise that authority. For that reason, operators cannot be conscripted as "a corps of involuntary government surrogates . . . without providing the procedural safeguards respecting 'prior restraint' required of the government."

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[4](...continued)
Cf. Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978) *aff'd on other grounds*, 440 U.S. 689 (1979). We submit that this bootstrapped result was not intended by Section 10, and the Commission must therefore reject this approach to the current rulemaking.

Midwest Video v. FCC, 571 F.2d 1025, 1056 (8th Cir. 1978), *aff'd on other grounds*, 440 U.S. 689 (1979); see also Opening Comments at 58-60 (noting requirement of prior judicial procedures). To do so would impermissibly "subject[] the cable user's First Amendment rights to decision by an unqualified private citizen, whose personal interest . . . enlists him on the 'safe' side — the side of suppression." *Midwest Video*, 571 F.2d at 1057; see also Opening Comments at 30-34 (noting constitutional problems from liability provision of Section 10(d)).[5]

With this background in mind, we turn to specific proposals made in certain comments. As we show below, many commenters would have the Commission forego the restraint that is required of it under both the statute and the constitution. For that reason, we again urge the Commission to adopt the limiting construction of Section 10 that we offered in our Opening Comments. As we demonstrated in those comments, lockboxes are consistent with the PEG and leased access statutes, and they are the least-intrusive means for the Commission to implement any legitimate governmental interest in restricting children from viewing programming deemed inappropriate by their parents. Any other approach will fall below constitutional minima, as we pointed out in our Opening Comments.

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[5] We thus adopt the analysis of *Midwest Video* that holds that a system for censoring the access channel public forum violates the constitution when it lodges the power to censor with operators who may be held liable for failing to exercise that power. We also recognize that *Midwest Video* incorrectly determined in *dicta* that a regulation requiring operators to carry access channels violated the constitution. This incorrect determination has been rejected by the courts in later cases, which have upheld the statutory requirement that operators carry access channels. See cases cited in Opening Comments at 36 n.16.

SUMMARY

Even if the Commission fails to follow the constitutionally mandated course of recognizing lockboxes as the least restrictive means to effectively implement Section 10, it certainly cannot accept the main proposals forwarded by operators. First, the Commission must reject the suggestions that operators be given the power to edit broadly, pre-screen programming, and/or require certification from programmers. These proposals are either contrary to the statute, unnecessary under it, or potentially violative of the constitution. Second, the Commission must reject the suggestion of operators that they be granted an immunity to censor with impunity. Such an inducement towards widespread censorship fails to afford programmers the first amendment protection they are due. Third, the suggestion for indemnity and proof of insurance from programmers must be rejected because it both is unnecessary under the statute and implicates serious constitutional concerns.

If the Commission decides to wander into constitutionally dangerous territory by rejecting the lockbox course, there are certain suggestions of other commenters it may wish to follow in order to minimize the burden being placed on programmers' first amendment rights. While the Commission should not preempt state and local laws and franchise contracts forbidding operator editing, it should make clear that its national standards preempt state laws with regard to speech not allowed on cable. It should also require operators to unblock a channel upon a phone call from a subscriber. And it should stay the effectiveness of its final rule until courts have completed their review of it. Moreover, if lockboxes are given due recognition, operators should be forbidden from attributing lockbox costs as a cost of providing access. Instead, as the Commission develops regulations for operators' rates, the costs of lockboxes should be considered as a cost of providing cable.

I. THE COMMISSION WOULD HEIGHTEN THE UNCONSTITUTIONAL BURDEN ON PROGRAMMERS IF IT STRENGTHENED THE ABILITY OF OPERATORS TO CENSOR PROGRAMMING

Most of the operators filing comments have requested that the Commission grant them certain powers, beyond those contained in the Proposed Rule, that would strengthen their ability to keep the programming they choose off of PEG or leased access channels. We strongly oppose any such measure. Congress explicitly provided for PEG and leased access in the 1984 Cable Act, and local franchising authorities have negotiated contractual provisions for such channels, for the specific purpose of facilitating unedited programming.[6] To now grant the very same operators unbridled editorial discretion would contravene the clear intent of Congress. Moreover, it would exacerbate the unconstitutional burdens on speech that we discussed in our opening Comments.

The most blatant proposal in this regard comes from operators such as those who filed comments along with Acton Corp., who insist that they must have "broad discretion" to both establish and apply censorship standards because "different operators [have] different editorial positions." Acton Corp. *et al.*, at 2, 5. By its very nature, however, such a sweeping proposal would impermissibly allow wholly standardless censorship. The only government interest that even arguably supports Section 10 is the protection of children from programming deemed inappropriate by their parents, not the furtherance of each operator's unique editorial viewpoint. The Commission must therefore reject the proposal that

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[6] Despite these protections, some cable operators have attempted to impede access programming, as is demonstrated by the articles attached as Appendix A to these reply comments. If the Commission were to grant operators editorial power over programming, these instances are likely to multiply.

it read Section 10 to abrogate the general prohibition against operator editing, which remains intact."[7]

Certain of the commenters who make this proposal apparently recognize that it would allow censorship beyond constitutionally permissible bounds. Having asked for unbridled discretion, for them "[i]t is then irrelevant under the statute whether either the Commission or a court would reach the same conclusion as the cable operator." *Id.* at 3-4. The conclusion that courts would reach is of course relevant, however, for it is only they who can determine what speech is not deserving of constitutional protection. Indeed, as we pointed out in our Opening Comments (at 58-60), the prompt application of such judicial process is a necessary component of any constitutionally permissible content-based prior restraint on speech.

For these reasons, the Commission must emphatically reject operator proposals that seek broad editorial discretion. If the least-restrictive lockbox regulatory approach is rejected, the Commission — in order to avoid promulgating a regulation that is also overbroad — would have to clarify that programmers may be barred from including in their material only that speech which is constitutionally

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[7] In any event, we note that the editorial policies of some operators are to program non-access channels with sexually explicit material even as they seek to ban such material from access channels. For example, although Time Warner lists in its comments a handful of access programs it "would not choose to provide" (at 3-4), it neglects to inform the Commission that the highest rated documentary series carried on its Home Box Office division is called "Real Sex." "Real Sex" has highlighted segments such as, *inter alia*, a home striptease class and a studio that makes pornographic films for women. See Appendix B. As we discussed in our Opening Comments (at 49-54), the Commission has failed to rectify the constitutional problems of banning material from access channels while allowing it on other channels. If the Commission does not adopt the lockbox approach, it should therefore "prevent operators from prohibiting from access channels the same type of programming it carries on other of its channels." *Id.* at 50-51.

unprotected, as defined by the Commission.[8] In addition, rather than allowing an operator to make its own determination as to whether a particular program falls outside the scope of constitutionally protected speech, the Commission must clarify that only a court may declare that a program is obscene and order it kept off the air.

No less problematic is the suggestion by several operators that the Commission's final rule contain a provision that would allow them to pre-screen programming before it is aired on PEG or leased access channels.[9] Pre-screening is highly objectionable for several different reasons. First, by allowing pre-screening, the Commission would place operators in the position to make specific editorial demands before giving final approval.[10] Such editorial control flatly contravenes the PEG and leased access statute — which retains at its core the principle that speakers who use PEG and leased access channels must be allowed to program without regard

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[8] If a lockbox regulatory approach is rejected, confirming PEG censorship to Commission-defined speech becomes a necessary implication of Section 10(c) of the statute. Section 10(a), on the other hand, concerns speech over leased access channels that an operator "reasonably believes" is indecent. Nonetheless, the Commission should treat leased access in the same manner that the statute treats PEG to avoid constitutional difficulties. As we pointed out in our Opening Comments, prior restraints can only attach with the guarantee of a prompt court determination that some constitutional standard would otherwise be violated (at 58-60); they cannot be imposed under standards developed by a non-neutral entity whose own liability may prompt it to censor widely (at 30-34). Allowing operators to censor based on their subjective beliefs would violate these first amendment principles.

[9] See Acton Corp. *et al.*, at 5; Blade Communications, Inc. *et al.*, at 12; Continental Cablevision, Inc., at 5-6 (advocating pre-screening if the Commission rejects a certification system); InterMedia Partners, at 4, 18.

[10] The suggestion of some operators that they should "be able to impose monetary penalties on programmers," see Acton Corp. *et al.*, at 8, must be rejected for similar reasons. To give operators the power to penalize programmers would also implicitly grant them the power to make editorial demands in advising programmers how to avoid those penalties.

for the operator's editorial preferences. Second, as we pointed out in our Opening Comments (at 26-27 & 32), any pre-screening requirement would likely eliminate all live programming, including call-in shows, regardless of whether they contained prescribable speech. Third, several operators have noted the inordinate expense that pre-screening occasions. See, *e.g.*, Community Antenna Television Association, Inc., at 3-4; Time Warner Entertainment Co., L.P., at 19.

Moreover, pre-screening as proposed by the operators would also violate the first amendment in two ways. First, the pre-screening proposals contain no reasonable time limits. By allowing an operator the power to threaten indefinite delay, such pre-screening would constitute a prior restraint that exacerbates all of the problems of allowing operators to exercise unbridled editorial control over access programming. Put another way, such pre-screening adds the element of unrestrained delay and necessarily places all programs under a prior restraint: even programming that does not contravene an operator's editorial policy will necessarily be delayed from airing, regardless of how timely it is.

Second, the pre-screening proposals forwarded by operators call for unreviewable discretion. For example, InterMedia Partners pronounces that, as part of its proposed pre-screening, "InterMedia's determination as to whether a particular program complies with its policy will be the *final* determination." Intermedia Partners, at 7 (emphasis added); see also Tele-Communications, Inc., at 2 (urging that no dispute resolution mechanism is necessary because the operator's decision should be final). This unaccountable exercise of power necessarily raises the prospect that arbitrary or irrational decisions will go unchecked. In contrast, the constitution requires prompt judicial procedures, as we

discussed in our Opening Comments at 58-61.[11] For these reasons, as well, the Commission must reject pre-screening.

Several operators have also requested that the Commission allow them to require programmers to certify that their programming does not fall outside of the operator's policy regarding allowable speech. An integral part of this certification proposal would immunize operators from liability for carrying programs certified not to be indecent, but later held to be so. The Commission should reject these proposals because certification should not be necessary to insulate operators from liability when they allow access programming to air, as the PEG and leased access statutes require them to do. At most, the Commission's final rule should state that no liability will attach to an operator if a programmer violates the Commission's rule and an operator's policy against indecent programming.

As an initial matter, we note that the operators' perceived need for certification and its attendant immunity for failing to censor apparently stems from their mistaken assumption that Section 10 has given them editorial control over PEG and leased access channels. However, as we have discussed above, see *supra* at 3-5, the 1992 Act has not amended the portion of the PEG and leased access statutes that *prohibits* operators from exercising *any* editorial control over these channels. Operators are therefore not placed in an active position with regard to editing PEG and leased access. Because liability should only be predicated on operators actively speaking or editing, liability should not lie in this instance. See generally *Farmers Educ. & Coop. Union of Am. v. WDAY, Inc.*, 360 U.S. 525 (1959).

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[11] Moreover, the NCTA notes that pre-screening would allow an operator to "both prohibit some programming and choose not to prohibit other programming." National Cable Television Association, Inc., at 9 n.8. Such unequal selective screening raises the specter of an unconstitutional system that allows speech to be regulated "based on hostility — or favoritism — towards the underlying message expressed." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2545 (1992) (quoted in Opening Comments at 53 n.25).

Consequently, to allay the fears of operators concerning liability, the Commission's final rule need only clarify that an operator cannot be held to be a liable party when a programmer violates that operator's policy and the Commission's standards prohibiting the broadcast of indecency. As InterMedia Partners pointed out in its comments (at 15), the Commission has followed a similar approach in *Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials*, 2 F.C.C.R. 2819, 2820 (1987), when it stated that "[u]nless an MDS common carrier has actual notice that a program has been adjudicated obscene . . . it will not be subject to adverse agency action." In the case of access programming, as in the earlier MDS context, there is neither "a high degree of involvement" nor the "actual notice of an illegal use" on which operator liability may be predicated. Because operator liability thus should not be implicated, there is simply no need for the Commission to require that programmers certify the content of their programs. Even without a certification, the operators should face no liability.[12]

In any event, a certification requirement such as that proposed by operators may very well be considered vague when viewed from the perspective of a lay programmer who is not tutored in fine first amendment distinctions. For that reason, a court might very well strike down such a requirement under the first amendment. *See, e.g., Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782 (C.D. Cal. 1991) ("'a conscientious applicant who takes the certification seriously is thus compelled to avoid undertaking any project that might even arguably violate' the vague certification requirement" that a production not fall short of the *Miller* obscenity standard) (citation omitted). Certification in this regard could be likened to an oath, which may similarly be considered unconstitutional if it chills speech by forcing self-censorship on the part of those who are unsure of whether they meet the implicated

[12] Under the operator's own justification, therefore, if the Commission were to adopt certification, it should at most go only so far as to have programmers certify that they recognize and accept their own liability if they fail to live by an operator's policy and the Commission's standards.

standard. See, *e.g.*, *Baggett v. Bullitt*, 377 U.S. 360, 373-74 (1964); *Speiser v. Randall*, 357 U.S. 513, 526 (1958) (oath takers "steer far wider of the unlawful zone"). Rather than implicating these constitutional concerns, the Commission should reject the operators' certification proposals.

While each of these several different ways of strengthening operators' power to censor programmers is therefore inappropriate, we note that several commenters have urged that the Commission simultaneously adopt several or all of them.[13] However, viewing these measures as somehow complementary is especially wrongheaded. To the contrary, if the Commission were to consider any one of these proposals appropriate despite the problems it poses, its implementation would negate the need for any other. For example, if certification (with its attendant immunity) were implemented, there would be no need for pre-screening. Because an operator would be held harmless for carrying programming mistakenly certified as not indecent, that operator has no reason to screen certified programming to determine whether or not program content meets operator standards. In this way, each of the operators' proposals are duplicative, and the Commission would be unnecessarily multiplying the burden on programmers' free speech rights if it were to adopt a number of them.

II. THE COMMISSION WOULD FURTHER HAMPER PROGRAMMERS' FREE SPEECH IF IT IMPLEMENTED SUGGESTIONS REGARDING OPERATOR LIABILITY

Several operators have requested that the Commission expand its Proposed Rule in two ways to minimize the liability operators may face for censoring PEG and leased access programming. First, several operators seek a blanket immunity from liability whenever they act as censors, regardless of the reasonableness of their activities in this regard. Second, many operators propose that the Commission's final rule grant them the power to require

[13] See Acton Corp. *et al.*, at 3-5; InterMedia Partners, at 14, 18; Blade Communications, Inc. *et al.*, at 12; National Cable Television Association, Inc., at 8-9.

programmers to indemnify operators and provide proof that they carry sufficient insurance to cover any such contingent liability. For reasons we now discuss, the Commission must reject all such proposals because they are both contrary to the requirements of the constitution and inappropriate under the statute.

The proposals to immunize operators' censorship add an unnecessary additional burden on the first amendment rights of programmers. All of these immunity proposals would prompt operators to censor as widely as they can in order to avoid even the most remote possibility of liability under Section 10(d) for carrying a program that "involves obscene material." See, *e.g.*, InterMedia Partners, at 6 ("InterMedia will interpret and apply this restriction broadly"). As we discussed in our Opening Comments (at 28-34 & 38-42), the impetus towards broad censorship created by the liability provision of Section 10(d) is not narrowly tailored to implement a compelling governmental interest, and it therefore contravenes the constitution. For a similar reason, the proposals to grant operators an immunity from liability must be rejected by the Commission: they would create a further incentive for operators to engage in standardless censorship and thereby chill the first amendment rights of access programmers.[14]

In a similar vein, several of the operator commenters have asked the Commission to include provisions in its final rule that would allow operators to require that programmers guarantee indemnification and provide proof of insurance concerning any possible operator liability. For both statutory and constitutional reasons, the Commission must reject the proposals to enshrine indemnification and insurance provisions in its final rule. First, there is no reason to read into the statute any concern with

[14] We also note that such an immunity is unnecessary under the statute. As we demonstrated above, operators are not active PEG and leased access programmers and hence should not face the risk of liability absent actual notice of a prior court action finding a particular program obscene. Consequently, immunity for censorship — an activity operators should not be engaged in — is contrary to the prohibition that they not edit access programs.

indemnification or insurance issues. Potential liability from programming arises from a wide variety of theories (such as negligence in the act of filming a show) under which a plaintiff may name the operator. The operators now seeking indemnification and proof of programmer insurance have failed to suggest any basis to differentiate liability with regard to program content from all of the other forms of potential liability, with regards to which indemnification issues have long been successfully handled on a case-by-case basis under the common law.[15]

Second, the Commission should avoid widening its rulemaking to reach indemnification and proof of insurance issues because such requirements may raise first amendment concerns. A concern with only the content of speech that is to take place in a public forum affords "no justification for insurance or hold harmless conditions . . . [and] they may not constitutionally be imposed" by the government. *Invisible Empire of the Knights of the Ku Klux Klan v. Mayor of Thurmont. Md.*, 700 F. Supp. 281, 286 (D. Md. 1988). When crafted with regard to content-based liability, indemnification and insurance requirements necessitate an impermissible examination of the contents of the proposed speech, and they impermissibly levy a heavier financial burden on controversial speech. *Collin v. Smith*, 578 F.2d 1197, 1207-09 (7th Cir.), *cert, denied*, 439 U.S. 916 (1978).[16] Moreover, the proposals that the operators have forwarded in this docket are not only content-based, but they ask the FCC to adopt a standardless regulation. Under these proposals, both the amount of the insurance demand and the decision of whether or not to make that demand would be left to the unfettered discretion of operators. This standardless discretion is inappropriate in all prior restraint contexts, but especially where the

[15] Insurance is an apt consideration in one regard. Operators who are concerned with liability for censoring PEG or leased access may purchase their own insurance to protect themselves against their own negligence.

[16] For the same reason, the Commission must also reject as constitutionally infirm the suggestion of operators such as Acton Corp. *et al.*, at 8, that programmers be required to post a bond before being allowed to program on the PEG and leased access public forum.

decisionmaker has declared that it will exercise that discretion with the content of speech in mind. *Forsyth County, Ga. v. Nationalist Movement*, 112 S. Ct. 2395 (1992).[17]

III. WHILE SOME NATIONAL STANDARDS SHOULD BE ADOPTED, OTHERS ARE WHOLLY INAPPROPRIATE

Several programmers also argue that the Commission should adopt uniform national standards on certain matters. While we support some of these efforts, others clearly raise serious problems.

Foremost among the objectionable proposals is that which concerns federal preemption of provisions of state laws, local ordinances and franchise contracts that prevent operators from editing access programs. See Continental Cablevision, Inc., at 6-8. As an initial matter, Section 10 is not phrased in the mandatory terms that would preempt state and local regulation of the franchise process. In other words, while Section 10 states that an operator may choose to adopt certain censorship policies, it neither vests that choice exclusively with the operators nor removes states and localities from playing their role in the process. Moreover, the preemption that is urged would abrogate existing franchise contracts, whereby operators have voluntarily agreed not to edit access programming. Nothing in Section 10 indicates that it is intended to abrogate existing contracts whereby operators have already exercised their options and decided to allow all types of programming — including sexually explicit or politically controversial material — in its access channels.

Preemption may nonetheless be appropriate in one circumstance. If the Commission fails to follow the least restrictive lockbox approach, it must carefully define the categories of speech which it would allow operators to ban if it is to avoid also violating the constitution through an overbroad regulation. See Opening

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[17] The reasoning discussed in text applies equally whether it is the programmer who would be required to provide proof of insurance or, as has also been suggested, an access center that administers the access requirements over a particular cable system. See Blade Communications, Inc. *et al.*, at 14 n.13; InterMedia Partners, at 7.

Comments at 54-57. Thus, as we suggested in our Opening Comments, the Commission should follow its prior indication to narrowly construe "unlawful conduct" and "sexually explicit" in the PEG standard.[18] In the same vein, the Commission should clarify that those standards preempt any others that may be found in state or local laws or ordinances. Similarly, the Commission should require that any sexually explicit or politically controversial material be weighed against the value of the programming when taken as a whole, and it should clarify that its mandate in this regard is preemptive. *Accord* Time Warner Entertainment Co., L.P., at 6-8. It should also define, with preemptive force, the relevant community to be cable subscribers.[19]

Finally, the National Cable Television Association, Inc. ("NCTA") in its comments proposes a national standard with respect to how subscribers nay request unblocking of the channel dedicated to indecent leased access programming. As we demonstrated in our Opening Comments, any system of central blocking is unconstitutional in light of the effective, less restrictive, lockbox mechanism. Were it not for lockboxes, we would agree that a uniform national standard for unblocking should be adopted, although we would still oppose the one offered by NCTA, which would delay the viewer's right to receive requested programming for sixty days. Such a burden on viewer's rights is unnecessary and therefore unconstitutional. Rather, if the Commission fails to adhere to the least restrictive lockbox approach, at a minimum it should require all operators to implement an unblocking system that mirrors the system currently used for pay-per-view services. After

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[18] For the reasons expressed in both the Commission's Notice and our Opening Comments, the Commission should reject the broad reading of these terms by InterMedia Partners and Acton Corp. *et al.*

[19] Blade Communications, Inc. *et al.*, at 7-8, suggest further segmenting the relevant community by tier of cable service. This approach should be rejected as unworkable, however, because only operators have information regarding the constituents who subscribe to each tier of service. Additionally, it is unnecessary, because access channels are available on several different tiers.

a subscriber has mailed the operator a written request to activate his ability to lift the block on the leased access channel,[20] the subscriber should be able to place a phone call to be able to receive that service with no further delay.[21]

IV. THE COMMISSION SHOULD IMPLEMENT CERTAIN OTHER COMMENTERS' SUGGESTIONS WITH IMPORTANT MODIFICATIONS

A number of commenters have forwarded two suggestions with which we agree, at least with important modification. First, several commenters have recommended that the Commission include in a cable system's rates whatever costs operators incur in implementing Section 10 and the Commission's final rule. See Community Antenna Television Association, Inc., at 7; Continental Cablevision, Inc., at 10-11.[22] We agree with these commenters, but only for lockboxes. The sensible approach to paying for lockboxes is to include their costs in developing regulations for cable operators' rates. This sensible approach to cost spreading will also allow the Commission to further assure that no parents are deterred from using lockboxes to keep their children from viewing programming

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[20] In all instances, the Commission should prescribe the form of request an operator is required to present to subscribers. In order to protect subscribers' privacy, see 47 U.S.C. § 551, that form should be phrased in neutral terms that do not allow the operator to build a record that the subscriber has requested sexually explicit or politically controversial programming.

[21] Moreover, the operator should be required to ask new subscribers as part of their initial subscription questionnaire whether they want all access channels unblocked.

[22] Other commenters make objectionable suggestions with regard to who should bear these costs. Cox Cable Communications, at 10-11, suggests that those subscribers who request unblocking should bear the cost of blocking. This suggestion should be rejected because it places the burden of paying for blocking on precisely those subscribers who do not find it a benefit. Similarly, the suggestion that programmers pay the cost of blocking, see Blade Communications, Inc., *et al.*, at 9-10; InterMedia Partners, at 20, also further burdens those who do not find censorship to be a benefit.

that they deem inappropriate.[23] Of course, since lockboxes are effective for this purpose with respect to all channels (and not just PEG and leased access), the Commission should concomitantly clarify that cable operators cannot attribute the costs of lockboxes as a cost of providing access.[24]

Second, we agree with the comments of Continental Cablevision, Inc., at 9, 13-14, to the extent that they urge the Commission to recognize that, if the Commission fails to adhere to the lockbox approach, all cable operators will need at least 120 days before they can implement the Commission's final rule. The Commission should further clarify that during the necessary interim period of delay, all provisions of Section 10 are to be stayed. Moreover, the Commission should recognize the potentially serious constitutional difficulties raised by its rulemaking. The stay should therefore include whatever period is necessary for the courts to complete their review of this scheme, should such review be initiated.

CONCLUSION

Both operators and programmers appearing as commenters in this docket have agreed that the censorship scheme envisioned by the Commission's Proposed Rule would be unconstitutional. None of the suggestions forwarded by operators would cure these problems. To the contrary, they would only exacerbate the first amendment concerns raised by Section 10 and the Proposed Rule.

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[23] As we noted in our Opening Comments, even with their associated expense, the Commission has on several occasions found that lockboxes are effective. See Opening Comments at 47.

[24] Moreover, as a generic matter, operators who voluntarily choose to censor PEG channels pursuant to Section 10(c) or leased access channels pursuant to Section 10(a) should not be allowed to include the costs of that voluntary activity as a cost of providing access or for any other purpose.

We therefore again urge the Commission to recognize lockboxes as the least restrictive means of effectively implementing Section 10.

Respectfully submitted,

/s/

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Dated: December 21, 1992

Appendix A

Linda Haugsted, *Warner, Access Group in Shootout*, MULTICHANNEL NEWS, May 20, 1991 at 1

There's a gunfight brewing at the PEG corral in Houston, and if the city's public access group has its way Warner Cable will lose its franchise.

At one end of the street is Warner Cable Communications, Inc. of Houston, which is facing down Access Houston Cable Corp. Access Houston is armed with a franchise document that, its executives believe, gives it the right to decide what will be programmed on a new educational access channel, an assertion being challenged by the operator.

Bystanders include the International Channel, the Silent Network and Mind Extension University, all satellite services that the access group wants to schedule on the new channel.

The dispute has arisen over a deceptively simple question. What constitutes "local" programming?

Warner has one education channel and has been reserving a channel slot for a second such service. Access Houston determined that there was sufficient interest to activate the second channel by May 1.

Warner was agreeable until it found out that Access Houston wanted to use Vietnamese and Chinese language programming from the International Channel, programming for the deaf and ME/U selections, in addition to French lessons and classes from the University of Houston, on the second channel.

According to the satellite services, there are precedents for such programming: ME/U and Silent Network are on educational channels elsewhere, but the International Channel is not.

In a letter to the city dated April 19, system president James Daley said Warner will not cablecast the satellite-delivered programs because they are not appropriate for a local access channel. He added that satellite programming generates costs that Warner should not have to pay.

Pam Thorne, director of public relations for the system, said delivering the satellite service would cost Warner

Houston $85,000 to $100,000 for a new satellite dish and other support hardware. PEG stands for public educational and government channels.

The city's attorney, Clarence West, wrote back that Warner's interpretation of its obligation was erroneous, saying that as the local educational authority, Access Houston has the power to determine scheduling to meet special audience needs.

A blackout of its choice of shows would "violate the letter and spirit of the franchise" and represents an attempt at editorial control in violation of federal law. West also wrote that Warner is responsible for any "reasonable and appropriate" expense incurred by satellite programming.

Refusal to cablecast the programming scheduled by Access Houston represents a franchise violation, the attorney warned, adding that if the educational channel did not run by May 15, Warner would be considered in violation of its franchise. The system negotiated a extension of the compliance to May 23.

Revocation is the only punitive remedy mentioned in the franchise for material breach of contract.

"I suspect the city will begin that process [revocation] ... the council seems amendable. I expect to fight this all the way," said Tomas Cantrell, executive director of Access Houston.

He said satellite programming would not generate significant cost to Warner. Warner is already "looking at the appropriate birds," he said. Warner carries C-SPAN, which is on Galaxy 3 with ME/U; and the International Channel and Silent Network are on Satcom F4. Warner turns to Satcom F4 for its pay-per-view special, Cantrell added.

Thorne Said Warner is not "already looking at the right satellites," adding that $100,000 doesn't seem to be a "reasonable and appropriate cost" for the new channel.

Cantrell said Warner's opposition has angered some segments of the community. A group of 40 Silent Network supporters picketed the operator at the beginning of May bearing signs reading "Shame," according to local reports. But Thorne said that before the access flap began, the system

was talking with the city council about cablecasting some Silent Network programming on a municipal access channel, an agreement that is still possible.

The dispute leaves the programming networks in a awkward position; they want access to the community, but not at the cost of alienating a large MSO. Some did not want to discuss the dispute.

Andy Holdgate, vice president of ME/U, said that where his service is on educational access in other markets, the programming decision was made mutually and amicably by access and system officials.

"We enjoy the fact that our carriage has been mutually supported. We're hopeful that, in time, we can be available (in Houston), but we recognize that there are specific issues between the franchiser and franchisee that need to be cleared up," he said.

Lawyers familiar with cable franchising disputes contacted by MULTICHANNEL NEWS said access requirements could become a hot legal area in the next few years, since it is an area uncharted by legal precedent. "Local" is often ill-defined, in a legal sense, in documents.

One attorney, who asked not to be named, gave an example of the dilemma facing companies: If a local producer makes a documentary on France, is that local programming? Or is a documentary on Houston, directed by Frenchman?

As for whether Warner faces a serious threat of revocation for material breech, attorneys said a judgment would have to be based on the franchise document, the company's original response to a request for proposals and the articles of incorporation of the access corporation and any other contracts between the city and company.

The intent of each of the parties would be determined through these documents. But as a practical matter, every major issue can be solved by compromise, they said.

Compromise is just what Thorne anticipates.

"We are working with the city to put this to rest," she said.

Linda Haugsted, *Warner Cable Houston Up for Renewal*, MULTICHANNEL NEWS, July 22, 1991 at 14.

Refranchising negotiations for Warner Cable Houston began last week amid allegations that the operator censored a public service message soliciting comments on its performance.

The charges were hurled by Access Houston, the operator's access corporation, with which the system has been feuding.

Warner initially declined to run the inflammatory spots proposed by Access Houston on its educational channel.

The spots included statements such as, "Tired of paying among the highest rates in the country for cable TV? Tired of bad reception? Did you know that you pay among the highest rates in the United States for cable TV?"

Also mentioned in the spots was the absence of Mind Extension University, The International Channel and the Silent Network, networks that Access Houston wants programmed on a second educational channel.

Warner has declined to run them there, however, stating that the programming is not local and that the new additions would cost too much. Access Houston has sued the cable system over this issue.

The spots also urged subscribers to attend the first public hearing on refranchising Warner Cable, held July 16, or call a municipal cable TV hotline to register concerns about cable service.

Access Houston notified the local press about Warner's refusal to show the spot, as well as soliciting the support of the city attorney's office to compel Warner to cablecast the meeting notice.

The controversial spot was cablecast the day before the meeting, officials said. Regarding the censorship charge, Warner told the local press, "This hearing was widely publicized."

The publicity on the issue may have driven calls to the city's cable hotline, noted Rhonda Andrews, administrative manager, regulatory affairs for the city.

More than 350 calls, "generally negative," came in by hearing time, she said. Consumers' top complaints were

picture quality and programming choices.

The system is using all available channels now, including some that suffer seepage from broadcast stations. Most of these ingress channels are programmed with public access, Andrews said.

On the programming issue, callers said they'd like to see some programming services not currently offered, most frequently naming American Movie Classics and Bravo. Andrews added.

At the public hearing before a committee of the City Council, Warner was lauded for its community projects by many of the charities it has aided, by local businessmen who deal with the company and teachers who use Cable in the Classroom.

But it was also dunned by some of the 54 speakers, several of whom were access producers or affiliated either with Access Houston. Of the speakers, Andrews judged that one-third were affiliated with Access Houston or Warner and two-thirds were members of the general public.

At the hearing, the impartiality of one of the council members was questioned. Warner's critics circulated financial disclosure forms of Councilwoman Christin Hartung, alleging that she was a stockholder in the cable company's parent, Time Warner Inc., and had received a political contribution from the cable company's local president.

The councilwoman told local reporters that the stock is actually her husbands's and that the donation does not necessarily mean that she supports the contributor.

The hearing was only the first volley in the refranchising process. Warner's current franchise expires in 1994, and the company has not yet proposed any operational changes under a refranchise, said Andrews. Two more public hearings will be held as part of the refranchising process.

System Notes, MULTICHANNEL NEWS, July 22, 1991 at 43.

MASSACHUSETTS

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· **Springfield**: Springfield's consultant on Continental Cablevision will survey community access users to see if a group of disgruntled program producers has valid arguments with the firm. Group cites lack of access to facilities, worn and worn out equipment, staffing problems and an "unclear" budget. Continental has said it has fulfilled its license agreement to provide public access.

NEW JERSEY

· **Old Bridge**: "Big MAC" — the town's municipal access channel — operates on "no budget," according to its executive director for programming, but subsists on corporate donations of equipment and the elbow grease of volunteers. The community bulletin board service cablecasts over channel 29 on the TKR Cable Co. system here. Still, "Big MAC" plans to move from cramped quarters of the Town Hall to a proposed addition to the central Old Bridge Public Library. Channel will also ask township council for $10,000 next year to pay for editing equipment and to prepare town council chambers for cablecasts.

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PENNSYLVANIA

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· **Altoona**: Area public library officials went to meet with Warner Cable Communications' manager to discuss company's assertion to a citizens cable committee that library's media center in a local hotel is also Warner's local studio. Library officials said that although Warner Cable has equipment there, and cablecasts local access programs from the center, cable company pays no rent and provides no maintenance. Cable committee had been trying to find out whether Warner was living up to all stipulations of franchise, which specifies that Warner maintain a studio in Altoona, according to a library official.

Appendix B

Jerry Adler with Vernon Church, *Was It Good for You, Too*, NEWSWEEK, February 24, 1992 at 63

"Real Sex" is the ultimate reality in programming.

BODY:

If you've ever wondered if you have what it takes to be on TV . . . well, "Real Sex," on Home Box Office, proves that you do. The people having sex on "Real Sex" are human beings just as God made them. If you've forgotten what women look like without breast implants, the women on "Real Sex" will remind you. The men on "Real Sex" invite comparison to no other species. In answer to the question that Americans have asked since the start of the sexual revolution -- do people really do that? -- the show proves not only that they do, but that they use the same body parts you saw in the shower this morning.

"Real Sex" has all the virtues of improvisation: no discernible premise, no host and virtually no celebrities. The first 45-minute-long segment, which has been shown a dozen times since November 1990, revealed the goings-on at a women's vibrator workshop, a home striptease class and a studio that makes pornographic movies for women. The premiere was HBO's top-rated documentary for the year. A second installment also has been shown 12 times, and a third will debut on Feb. 22. It is always shown late at night. Executive producer Sheila Nevins insists the show has not "crossed any sexual boundaries. We don't show intercourse, we don't show erections. Considering its success, the quotient of criticism from the audience is minuscule." She didn't describe the response from people not in the audience, but HBO has been uncommonly modest about the show, taking several days even to come up with someone to speak about it on the record.

Yeasty name: Throughout, "Real Sex" has kept the same tone, blithe and uplifting and full of relaxed, happy post-orgasmic smiles. "Real Sex" was conceived at a time when "it seemed like life was getting pretty depressing and sex had become mortally wounded and if we could do a program about safe sex that had a sense of humor people could laugh free of charge," says Nevins. That explains a lot about the show,

including the home-porno sequence of a man in a propeller-topped dildo beanie, and the fact that the women's pornography producer, "Candida Royalle," seems to have chosen a stage name strongly reminiscent of a vaginal yeast infection.

But there's also lots to be learned about "Real Sex," even for people who may have had it once or twice themselves. Experience the chaste thrill of going on a date with a beautiful 31-year-old dancer who wants to stay a virgin! Find out about the tupuli, supposedly a Cherokee term for "the sacred black hole of creation" (a linguist at the Cherokee Nation of Oklahoma said he'd never heard of it); learn to make love the HBO-Cherokee way, by "placing your tipili in front of the tupuli" and moaning on a blanket. Hear "Auntie Maim" explain why "business executives, lawyers and air-line pilots" pay $175 to be handcuffed to a wall and whipped by a woman in a leather collar. (It's because it's a relief for them not to have to be in charge.) Discover what's really on the minds of savvy Nevada prostitutes. (How to save for their retirements.) And remember, someday "Real Sex" might make you famous for 15 minutes, in which case . . . well, try to make it last 15 minutes.

Cover Omitted

FCC Caption Omitted

Reply Comments of Cambridge Community Television

Pursuant to the Commissions Notice of Proposed Rulemaking ("NPRM"), Cambridge Community Television ("CCTV") submits these comments on the comments due December 7, 1992 on the proposed regulations implementing the provisions of the Cable Consumer Protection and Competition Act of 1992 ("Act") relating to indecent and obscene programming.

CCTV, founded in 1987 is the independent non-profit corporation providing community access to television services to residents, organizations, and business in Cambridge, MA. CCTV has a 15-year contract with Continental Cablevision. This contract is incorporated into the license issues by the City of Cambridge.

CCTV receives 3% of the gross annual revenues of the Cambridge system to operate 4 community access channels and a television production facility in One Kendall Square, Cambridge. Since CCTV opened in 1988 over $1,000,000 in free video production services, more than 15,000 hours of programming, and more than 1,500 residents trained in video production. CCTV is recognized as one of the leading access centers in the country.

CCTV did not provide a response to the NPRM due December 7 because our interests were being represented by the Alliance for Community Media. We would also wish to draw the Commissions attention to the comments of the Boston Community Access and Programming Foundation which is located across the river from Cambridge. However, after reading the comments submitted by Continental Cablevision in which CCTV was essentially named in

footnote #3, the Board of Directors of CCTV felt that it was their responsibility to reply.

We wholeheartedly agree with the statement by Continental "urging the Commission to adopt a regulatory scheme that minimizes the operators editorial intrusion in access programming so long as their liability is correspondingly minimized. (p.2)" We feel that if producers are going to be given the rights to access cable television channels they, and not the cable operator, should also take the responsibility for their programming.

Although Congress included language requiring the Commission to promulgate regulations to "prohibit the use . . . for any programming which contains obscene material . . ." we can not imagine that the Congress wanted to create a de facto banning of live programming or of indecent programming. Nor do we feel that the Congress wishes to stifle access to one of the only media forms available (community access cable) by groups which otherwise have no access to media outlets. Congress is looking for a reasonable solution to a rare occurrence.

We recognize that programming mentioned in the Act creates difficulties, but just because something is difficult does not mean it should be prohibited. There are mechanisms which CCTV has instituted in recognition of difficult programming. For example, we run a disclaimer on programming which may offend a cable viewer. The responsibility is on the shoulders of the producer to flag a difficult program. In addition, any difficult programming is shown as late as possible in our cablecast day. Producers who violate our policies will be suspended from using CCTV's facilities.

Where CCTV disagrees with Continental is in the event that the operator remains liable therefore the "operator must be afforded the discretion to exclude material that the operator reasonably believes to be obscene. And the operator must be permitted to ask for certification regarding a broader category of programming than obscenity—sexually explicit material, for example—so that the operator can review the sexually explicit programs to decide if it reasonably believes any of it obscene. (p.4-5)" . . . and . . . "1) the cable operator must be permitted to make its own determination . . . notwithstanding any certification that material is obscene and

should be excluded 2) word its certification request in whatever form it desires . . . ."

The cable operator is not the best authority to determine whether or not a program is obscene, sexually explicit, or promoting unlawful conduct (even with the caveat of NPRM footnote 11). It has been difficult enough to define obscenity. What is the definition of sexually explicit or unlawful conduct? Generally, there is not the personnel on the local level sufficiently schooled in the First Amendment to make these decisions. If rulings are based on an operator by operator basis there will be further problems of definition if an operator in one community has different interpretation of the "sexually explicit/unlawful conduct programming" from an operator in an adjacent community.

If the Commission insists that the operator has full liability perhaps a matter should go to an advisory board consisting of producers, citizens, cable operator personnel, access staff, City officials, etc. to make case by case decisions. This would at least afford some level of protection for the operator. The Commission may also want to consider language similar to that in the recent CPB Reauthorization Act which called for the FCC to "promulgate regulations..the broadcasting of indecent programming between 6 a.m. and 10 p.m. on any day by a public television station that goes off the air before midnight." (106 stat.964 public law 102-356, August 26, 1992)

Continental urges the commission to "prevent transforming these problems into a de facto ban on indecent programs." (p.2) We urge the Commission to not allow the operator to transform any regulations into a similar de facto ban on indecent programs. Any attempt to have the cable operator decide whether or not a program is obscene will have detrimental effects on that operator. Will the operator have to devote staff time to pre-screen all programs? The operator will be the judge and jury and have to function in the court of public opinion as well. What a position to be in! If the operator allows the program they are criminally liable, so the operator would take a less lenient view of any program, affording themselves full protection. On the other hand, a program in the grey area of

interpretation which is prohibited will create an uproar around censorship so that the operator loses either way.

As to the two programs mentioned in footnote 3. It would not be true to state that sexually explicit programs have never been shown on any access channel. However, CCTV's research has indicated that election related programming have caused far more difficulties than obscene programming. Having seen both of the programs mentioned in their entirety, CCTV would argue that neither is obscene. Of the more than 600 systems owned by Continental, most of them with local programming, only one hour of programming was found to be sexually explicit. In Cambridge less than one hour out of 15,000 hours of programming CCTV has run in the past five year may have been affected by the Act. Multiply that ratio by the thousands of hours of local programming seen every month on cable systems in the country, we end up with a tremendous effort for virtually no programming of this nature. And to be honest, community access channels do not have the viewership of network channels, so that the odds of viewers seeing obscene programming is further minimized.

If there is no significant amount of obscene programming then what is wrong with a few rules. By creating a set of burdensome rules such as insurance bonding of producers, pre-screening of programming, etc. we will all be looking for a needle in a rather large haystack. Clearly, a chilling effect on all types of programs will take place if sufficient road blocks to making programs are erected. Why not take all of the effort necessary to implement these regulations and use the energy to make for more and better programs.

Therefore, CCTV feels that there simply is not a problem which needs to be fixed. We urge the Commission to address the concern of the Congress by creating mechanisms which allow for the free flow of ideas, opinions, and images. The party responsible for the

program should be the owner of the program and not the cable operator or the access entity.

Respectfully submitted,

/s/

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FCC Caption Omitted

REPLY COMMENTS OF
CINCINNATI COMMUNITY VIDEO, INC.

The recent comments that were filed by the cable industry in this proceeding seem to say that if cable companies are given broad authority to implement the regulations adopted by the FCC in regards to access channel programming, many of the cable companies will exercise this authority as fully as possible, even if the end result is to prevent the use of access channels altogether.

However, this result cannot be fully reconciled with the basic purposes of the Cable Act, one of which is to promote diversity. Therefore, Cincinnati Community Video is urging the FCC to reject any proposal that would allow the cable operator so much authority in banning public access programming. What the FCC must do instead, as urged by the Alliance for Community Media (ACM) and others, is to adopt rules that more carefully and narrowly define the circumstances under which access programs can be banned.

Aside from the constitutional and statutory reasons identified in comments filed by the ACM, there are a number of good reasons why this is so. The first issue is the sheer amount of time it would take to review access programs for content violations.

In our case, citizens and community organizations supplying local programming to four public and educational access channels on the Cincinnati cable systems create over 400 new hours of programming a month. The practicality of setting up a review process in anticipation that there might be an obscenity is not prudent. It is particularly imprudent when consideration is given to the fact that in 10 years of access operations with over 30,000 access programs cablecast not a single obscenity violation has ever occurred.

The second reason is Congress' intention to allow for program diversity. This intention comes to fruition through public access. Public access allows all constituencies to speak, to use the pervasive

medium of television to communicate opinions. Thousands of citizens and non-profit agencies use or have used public access here. From the Better Housing League to the NAACP to the Cincinnati Board of Education, all are using or have used public access television. Any ruling that would delay or otherwise jeopardize the timely delivery of public access programs would inappropriately stifle the diversity of programming which Congress sought to encourage.

Finally, Cincinnati Community Video finds especially unclear Warner Cable's specific comments to the FCC regarding the Cincinnati, Ohio public access channel cablecast of nude sports programming supplied by a nudist organization as an example of local indecency. The area chapter of the American Sunbathers Association did supply a program about nudist lifestyles in March of 1992 which ran no earlier than 12:30 am. There were virtually no complaints from citizens regarding public indecency. There was far more public outcry regarding decency when Warner Cable offered the Playboy channel here. They eventually pulled it from the channel lineup as Warner had problems controlling illegal receipt of the service. Our overall concern is the use of the term "indecent" which Warner applies to this particular access program. We fear it is an example of how they will exercise unlimited rights to censor access programming and, as in this case, develop sweeping generalizations regarding the labeling of program materials as indecent.

There is no reason to allow operators to so interfere with access operations, established and operating by mutual agreement. For reasons stated above, the Commission should reject proposals by the cable industry that cable companies be granted broad authority to censor PEG programming, and adopt proposals made by the Alliance for Community Media.

/s/
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December 21, 1992

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REPLY COMMENTS OF THE CITY OF ST. PAUL

Table of Contents Omitted

SUMMARY OF ARGUMENT

Cable operators in many communities have expressly agreed not to exercise any control over facilities provided for public, educational or governmental ("PEG") access use. In St. Paul, Minnesota, for example, the City of St. Paul ("the City") has authority to determine the rules and procedures that will govern use of all access facilities and equipment. The franchised cable operator, Continental Cablevision of St. Paul, Inc. ("Continental"), expressly agreed to this provision. In December 7, 1992 comments to the FCC, however, Continental's parent company (and other cable operators) asked the Commission to determine that such provisions, and related provisions governing indemnification of cable operators, are preempted by Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("the Act").

Agreements regarding control over, and liability for, PEG access facilities should remain fully enforceable. Such agreements are not in any way inconsistent with, or preempted by, the Act. Section 10 of the Act permits, but does not require, cable operators to censor certain types of PEG access program material. Nothing prohibits a cable operator from entering into contracts at the local level (with cities, access centers or producers) that define how and under what circumstances this permissive right may be exercised; indeed, nothing prevents the operator from agreeing that it will not exercise any rights it may have to ban certain types of PEG

programming. The Cable Act fully supports and is consistent with such agreements. For example, it generally requires cable operators to refrain from exercising editorial control over PEG channels (47 U.S.C. § 531(e)) and specifically authorizes franchising authorities and cable operators to enter into agreements "that certain cable services shall not be provided or shall be provided subject to conditions if such cable services are obscene or are otherwise unprotected by the Constitution of the United States." 47 U.S.C. 544(d)(1).

Moreover, an operator's promise not to interfere with rules regarding PEG facilities is often made in exchange for substantial benefits. For the FCC unilaterally to modify carefully negotiated agreements and to invalidate promises made by cable operators would unfairly and unnecessarily harm franchising authorities, cable subscribers and PEG access programmers.

FCC Caption Omitted

REPLY COMMENTS OF THE CITY OF ST. PAUL

I. INTRODUCTION

The City of St. Paul, Minnesota ("the City") issued a 15-year cable franchise to Continental Cablevision of St. Paul, Inc. ("Continental"). According to the franchise, as amended, Continental is obligated to make available for access programming purposes six video channels on its cable system in the City, for public, educational and governmental ("PEG") use.

During the course of the franchise, disputes arose between Continental and the City. The City notified Continental that it was out of compliance with the franchise and, as a result, Continental filed an application to modify the franchise. Shortly thereafter, the City issued a violations notice to Continental. One of the primary issues of dispute pertained to Continental's failure to comply with its obligations with respect to PEG access facilities. On September 15, 1992, the day after the Conference Report on the Cable Television and Consumer Protection Act of 1992 ("the Act") was

issued,[1] and after more than a year of intense negotiations, the City entered into a Settlement Agreement with Continental, whereby the City agreed to rescind its violations notice and Continental agreed to rescind its modification application. Prior to the settlement, Continental had broad obligations to support PEG access and to produce local origination programming. As part of the Settlement Agreement, Continental was relieved of all of its local origination programming production obligations, and its PEG obligations were restructured. While Continental will provide facilities and other specified support, responsibility for local programming obligations (including PEG) will be assumed by the City and/or by a non-profit entity or entities designated by the City (the "Designated Entity"), on a date agreed to by the parties.

As part of the Settlement, the parties agreed to make certain conforming changes to the provisions of the City Code that govern Continental's performance. The City Code, as amended, now provides that the Designated Entity will indemnify Continental for any acts or omissions on the part of the Designated Entity, but the indemnity provision expressly precludes claims for which Continental is immune from liability under 47 U.S.C. 558. In addition, continental agreed that the City would have responsibility for the rules and regulations governing the use of the PEG access facilities, and equipment.

Continental's parent company has submitted comments to the commission, requesting it to clarify that agreements by a cable operator not to exercise control over PEG facilities are preempted by the Act.[2] Similar requests have been made by other operators. The City urges the FCC to reject the pleas made by the cable operators, because agreements governing the manner in which operators exercise control over PEG channels, such as the recent St. Paul agreement, are neither inconsistent with, nor preempted by,

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[1] H. Rep. 862, 102d Cong., 2d Sess. (1992)

[2] Comments of Continental Cablevision, Inc. to the FCC, "Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992," MM Docket No. 92-258 at 6-8 (filed December 7, 1992) (hereafter "Comments of Continental").

the Act. Moreover, public policy concerns weigh heavily in favor of a determination that such agreements regarding a cable operator's liability for, and control over, PEG access programming are not in any way affected by Section 10 of the Act.

II. THE FCC SHOULD CLARIFY THAT THE ACT DOES NOT PREEMPT ANY AGREEMENTS BETWEEN A CABLE OPERATOR AND A FRANCHISING AUTHORITY REGARDING A CABLE OPERATOR'S LIABILITY FOR, OR CONTROL OVER, PEG ACCESS PROGRAMMING AND FACILITIES.

A. Nothing in the Act Prevents A Cable Operator from Agreeing to Waive Its Right to Censor Certain PEG Access Programming.

Section 10(c) of the Act requires the FCC to promulgate regulations that will *enable* cable operators to prohibit the use of PEG access channels for material that is obscene, sexually explicit or that promotes unlawful conduct. Plainly, the cable operator is at most permitted, but not required, to censor PEG access programming.[3] Not only is a cable operator not required to take any steps to prevent any type of programming on a PEG channel, but the operator will be immune from liability, pursuant to 47 U.S.C. 558, unless the program involves obscene material.[4]

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[3] The City profoundly disagrees with the unsupported assertion by InterMedia Partners that because cable operators are likely to exercise their rights to censor certain PEG programming, Section 10(c) is somehow mandatory rather than permissive. *See* Comments of InterMedia Partners to the FCC, "Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992," MM Docket No. 92-258 at 2 (filed December 7, 1992) (hereafter "Comments of InterMedia Partners").

[4] Section 10(d) of the Act only eliminates cable operator immunity for obscene programming shown on PEG access channels. Both operators and supporters of access have argued that this provision should be read to impose liability only where an operator knows that a program is obscene; under this approach, in situations where an operator does not manage access, it could have no liability for the programming.

A cable operator may refuse to exercise its power to prohibit certain types of programming material over PEG access channels, as a result of its own, unilateral decision. It follows that an operator may limit or condition any such authority it may have through a negotiated agreement with a franchising authority or any other entity. Continental's attempt to use potential liability as an excuse for voiding its contracts is unsupported by principles of contract law, which allow parties to allocate risks as part of their bargain.

The FCC has indicated that where a right under federal cable law is permissive, existing agreements that restrict use of that right remain in full force and effect. For example, the FCC concluded that franchise agreements requiring cable operators to pay less than the maximum amount of franchise fees permitted by new federal regulations were not affected by regulations allowing franchising authorities to charge more.[5] Likewise, a franchise agreement requiring a cable operator to pay only 3 percent of its gross revenues to the franchising authority is not preempted or otherwise affected by 47 U.S.C. 542(b), which allows a franchising authority to collect up to 5 percent of gross revenues.[6]

In the same way, an agreement by a cable operator not to exercise control over PEG access programming or facilities constitutes a valid contract, whereby an operator waives or conditions exercise of a permissive right. The operator has merely delegated to another entity the responsibility for administrating PEG access. The Act does not preclude an operator from agreeing not to exercise any powers it may have, and thus it does not invalidate

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[5] "Report and Order: Amendment of Subparts B and C of Part 76 of the Commission's Rules Pertaining to Applications for Certificates of Compliance and Federal-State/Local Regulatory Relationships," 66 F.C.C.2d 380, 403 n.24 (1977).

[6] Similarly, other permissive rights may be waived by agreement by the operator or franchising authority. For instance, franchising authorities have not been deemed to be statutorily required to exercise their rights under 47 U.S.C. 531(a) to require cable operators to provide PEG channel capacity.

an existing promise by a cable operator that it will not in any way interfere with PEG access use.

B. Preemption Analysis Does Not Require a Finding that Agreements Regarding A Cable Operator's Liability for or Control Over PEG Access Programming and Facilities are Preempted.

State and local activity is preempted by federal law only where (1) Congress has expressed a clear intent to preempt such activity: (2) Congress has completely occupied the field of regulation and has left no room for state or local activity; or (3) compliance with both federal and state or local law is impossible. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699 (1984). Where federal law can exist compatibly and consistently with state or local regulation, however, it is not preempted, and both remain in effect. *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) (federal regulation should not be deemed preemptive of state regulatory power in the absence of persuasive reasons). "Congressional regulation of one end of the stream of commerce does not, *ipso facto*, oust all state regulation at the other end." *Id.* at 145.

Congress did not in any way preempt the field regarding control over PEG access programming. It did not expressly prohibit franchising authorities and cable operators from reaching agreements with respect to control over PEG programming and facilities. Rather, federal law expressly allows such agreements. *See, e.g.* 47 U.S.C. § 544 (d)(1). Nor does Section 10(d) specifically require the FCC to allow operators to demand indemnities broader than those they may be able to obtain through valid contract negotiation.

Congress did not "occupy the field" of regulation in this area. Rather, a cable operator's right to exercise control over PEG programming is permissive rather than required (and even so is limited to three specifically enumerated types of programming). Further, a cable operator may be liable for PEG programming only

in cases where obscene material in aired, and even that potential liability may be strictly curtailed under FCC rules.[7]

Moreover, there is nothing inconsistent between the Act and state or local agreements that limit a cable operator's control over PEG use. To the contrary, 47 U.S.C. 531(e) specifically prohibits a cable operator from exercising editorial control over PEG channels and 47 U.S.C. § 531(b) allows the franchising authority to specify "rules and procedures for the use" of PEG channels. In amending the federal cable law, Congress chose to retain these provisions. Thus, agreements by cable operators not to exercise control over PEG access programming or facilities are consistent with, and in fact, reaffirm, federal law.

The fact that local or state activity addresses the same objectives as federal law does not necessarily require preemption. *Florida Lime and Avocado Growers*, 373 U.S. at 142. The Supreme Court has recognized, for instance, that a state may adopt in its own constitution individual liberties more expansive than those conferred by the Federal Constitution. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980).[8] Franchise agreements that limit control by and/or liability of cable operators over PEG access facilities are not in any way inconsistent with Section 10 of the Act. Rather, such agreements complement federal cable law. Nothing in the Act requires preemption of franchise or other agreements regarding PEG access facilities.

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[7] *See e.g.*, Comments of InterMedia Partners at 15-16 (urging FCC to adopt regulations imposing liability on cable operators only when they had actual knowledge that the programming contained obscene material).

[8] *In Pruneyard*, the Supreme Court upheld free speech rights guaranteed by the State Constitution without deciding whether those rights were protected under the First Amendment. Similarly, franchise agreements that preclude a cable operator from exercising control over PEG access programming provide greater freedom of speech than is required by federal law.

C. Public Policy Considerations Require a Determination that Agreements Regarding a Cable Operator's Liability for or Control Over PEG Access Programming and Facilities are not Preempted by the Act.

Continental's parent company has asked the Commission to sweep away all franchise provisions in which a cable operator has agreed to relinquish control over access programming and any provisions that indemnify cable operators for liability with respect to PEG access facilities, to the extent that such indemnity agreements limit a cable operator's control over obscene or indecent programming. Continental's parent company admits that such provisions are included in many franchise agreements.[9]

In essence, the Commission is being asked to substantially alter a significant number of carefully negotiated agreements, and to eliminate part of the consideration provided by cable operators in exchange for obtaining (or retaining) cable franchises. This represents no small sacrifice for franchising authorities, PEG access users, and cable subscribers. The Commission should consider carefully the public policy implications of acceding to the request made by Continental's parent and others.

The agreements that the cable operators ask the FCC to preempt are bargained-for concessions and constitute consideration by the operator. The City of St. Paul, for example, waived its claims to past, unpaid franchise fees, as well as certain other claims, specified in the Settlement Agreement, that the City might have raised against the cable operator, Continental. In exchange, Continental agreed, among other things, that it would not exercise any control over rules and procedures governing PEG facilities and equipment. This promise was a substantial element of the consideration provided by Continental, and constituted an integral and material part of the Settlement Agreement between the City and Continental. Continental's parent appears to be asking the FCC to eliminate part of its end of the bargain in St. Paul and elsewhere.

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[9] Comments of Continental at 6-7.

There is no need for the FCC to unilaterally change those bilaterally-negotiated agreements, and indeed, it cannot do so fairly, preserving the relative balance between the parties. There is no justification for preempting contracts where, as here, there is no conflicting federal law, and where to do so would deprive communities and cable subscribers nationwide of the benefits of promises made by their local cable operators, without providing any corresponding compensation.

III. CONCLUSION

For the foregoing reasons, the City of St. Paul, Minnesota respectfully requests that the Commission reject cable operator's request that it rule that state and local agreements regarding control over, and liability for, PEG access programming and facilities are preempted.

Letterhead of ACTV 21 Omitted

FCC Caption Omitted

REPLY COMMENTS OF
Columbus Community Cable
Access, Inc. (ACTV 21)

The comments filed by the cable industry in this proceeding indicate that, if cable companies are given broad authority to implement the regulations adopted by the FCC pertaining to programming on access channels, many of them will exercise it broadly, even if the result is to prevent the use of access channels altogether.

Such a result cannot possibly be reconciled with the basic purposes of the Cable Act, which include promoting diversity. As a result, ACTV 21 urges the Commission to reject any proposal that would leave the operator with broad discretion to ban programming on public access channels. Instead, as urged by the Alliance for Community Media and others, the FCC must adopt rules that carefully and narrowly define the circumstances under which access programming can be banned.

There are several good reasons why this is so (aside from the constitutional and statutory reasons identified in the comments filed by the Alliance for Community Media).

Several operators have suggested that, if they are given the broad authority to review PEG access programming for content, the result will be increased expense and delay in cablecasting programming. Many community programmers in Columbus would be denied the opportunity to speak on the public channel in a timely fashion. A few examples are: 1) several local community groups would not have been able to respond to and participate in the

discussion concerning anti-discrimination and zoning laws proposal by the Columbus City Council; 2) the open and frank health discussions about unsafe sex practices by community groups and health organizations could have been squelched; and 3) programs by and for young people about drug abuse which contain "street language" could have been banned.

Some operators have proposed that they be allowed to pre-screen programming at will. A pre-screening rule, or any rule that permitted the operator to exercise advance approval over programming, could make access unaffordable. A significant percentage of the individuals who use the public was channel in Columbus earn less than $15,000.00 per year. Additionally, many community organizations and nonprofits which use the access channel have very small operating budgets. FCC-imposed rules mandating indemnification, certification, bonds or liability insurance will place unnecessary financial obligations onto these individuals and organizations which they will not be able to bear. The FCC must not place discriminatory price tags on the public's right to speak on an electronic public forum.

Some operators have suggested that, if they are given broad authority, they will require access centers themselves to make certifications as to the content of programming. However, access center budgets are often fixed as a result of contracts with operators and/or cities, which specify what the access organization can and cannot do. Allowing operators to impose new obligations on access centers is not required by the amendments to the Cable Act, and would require access centers to take on new tasks without compensation. ACTV contracts with the City of Columbus to provide video training, outreach, promotion, equipment use and program scheduling functions for public access activities on a first-come, first-serve nondiscriminatory basis. ACTV's annual funding comes, in part, from the 3% franchise fees paid to the City by the two local cable operators, Time Warner Entertainment Company, L.P. and Coaxial Communications Inc. ACTV's City funding has not increased in three years while actual services provided have increased by as much as 77.5%. Added and unnecessary financial burdens for insurance, bonds or staff to perform pre-screening of

programs will have a major negative impact on services to the public. There is no reason to allow operators to so interfere with access operations, established and operating by mutual agreement.

Not only would this interfere with speech, the industry has not shown it is necessary to do so. In the course of negotiating the cable franchise, an indemnity clause between the City of Columbus and the cable operators was included in City Code, Chapter 595.08. Also, ACTV's contract with the City also contains an indemnity clause. And another local provision is found in Columbus City Code Section 595.05 (E) which states:

> The operator shall have no control over the content and scheduling of access programs other than the prohibition of: (1) any advertising material designed to promote the sole of commercial products or services including advertising; (2) lottery information; (3) legally obscene matter pursuant to applicable Federal, State, or City law.

ACTV is unaware of any actions taken by the cable operators under Section 595.05(E) within the last 10 years. And it is reasonable to assume that action against "legally obscene matter" could occur only after a court of competent jurisdiction finds certain "matter" to be "legally obscene." Additionally, Columbus City Code, Section 595.11(I) also requires the cable operators to provide "adequate technical means" to prevent reception by subscribers for the type of programming described in the FCC's proposed rules.

There is no reason to replace these agreements (or agreements where the operator has chosen to do without an indemnity) with a national standard, which may present serious legal questions.

For reasons stated above, the Commission should reject proposals by the cable industry that cable companies be granted broad authority to censor PEG programming, and adopt proposals made by the Alliance for Community Media.

/s/
Carl Kucharski
Columbus Community Cable Access, Inc. (ACTV 21)
394 Oak Street
Columbus, OH 43215

December 21, 1992

FCC Caption Omitted

**REPLY COMMENTS OF
DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.
ON NOTICE OF PROPOSED RULE MAKING**

Denver Area Educational Telecommunications Consortium, Inc. ("DAETC")[1] hereby submits the following reply comments in the above-captioned proceedings.

Cable Operator Discretion and Indemnification

In their comments, certain cable operators have asked that the Commission grant them undue latitude in implementing Section 10 of the Cable Consumer Protection and Competition Act of 1992 ("1992 Act").

For instance, comments submitted by Cole, Raywid & Braverman ("Cole Raywid") on behalf of certain cable companies (Acton Corp., *et al*) asked the Commission to rely extensively on operator "judgment" in prohibiting indecent material on leased access channels. Cole Raywid asks the Commission to foreclose damages for operators' "good faith refusal" to carry offensive programming.[2] As well, Cole Raywid seeks to place cable operator decisions beyond the bounds of Commission or court review.[3]

Far from implementing Section 10 of the 1992 Act in the narrowest possible fashion, these proposals would assign broad

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[1] As set forth in its Comments in this proceeding, DAETC is a non-profit corporation that programs leased access cable channels. DAETC's program service, known as The 90's Channel, appears 24 hours a day on eight cable systems serving over 500,000 subscribers.

[2] Acton Corp. *et al* at 2, 5.

[3] *Id*. at 4.

powers of censorship to private entities which have shown systemic hostility to leased access in general,[4] and insulate such entities, decisions from impartial review under law. Contrary to Cole Raywid's suggestion, the Commission must concern itself with the question of whether the content of barred programming is genuinely impermissible, rather than whether a cable operator has complied with a nebulous "good faith" standard.

DAETC strongly recommends that the Commission rule that operator decisions regarding the withholding of programming under Section 10 of the 1992 Act are subject to Commission review, and, through appeal, judicial review. We exhort the Commission not to protect operators from civil liability they incur as a result of refusing to transmit programming that is not legally prohibited. Clearly, to do otherwise is to eliminate risks in censoring programming, while leaving potential danger in transmission. It is not difficult to foresee that such incentives will favor censorship over expression.

Further, to adopt the proposals urged by Cole Raywid and certain other cable commentators is to undermine the principal intent of Congress in passing Section 612 of the Communications Act. As pointed out by The Alliance for Community Media, *et al*, the original and continuing purpose of Congress in Sections 611 and 612 of the Communications Act is to establish channels of speech which are beyond operator control[5] — a goal which directly contradicts Cole Raywid's proposals to give operators unbridled discretion over content.

Cost of Implementing Section 10 of the 1992 Act

Certain cable operators have asked that parties other than cable operators bear the expense of cable company implementation of Section 10 of the 1992 Act.[6] DAETC has searched the statute and

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[4] See comments of DAETC at 4, 5.

[5] Comments of the Alliance for Community Media, *et al*, at p. 3.

[6] See Comments of Continental Cablevision at p. ii and those of Intermedia Partners at p. iii.

legislative history in vain for any suggestion that others should bear the financial burden of implementation. As a non-profit entity with a limited budget, DAETC could well be forced out of business if required to pay for all or part of the implementation of Section 10 by a cable operator.[7] DAETC believes that given that the purpose of Section 612 is to expand the roster of speakers on cable television, it is not in the public interest to impose potentially fatal financial burdens on small leased access programmers.

Constitutionality of the Statute

An expressed in DAETC's comments in this rule making, DAETC believes the indecency provisions of Section 612 of the 1992 Act are unconstitutional. We note with some satisfaction that a broad spectrum of other commenters have expressed similar views. Nonetheless, DAETC acknowledges that the commission must proceed with this rule making until the statute is stayed or overturned.

Respectfully submitted,

DENVER AREA EDUCATIONAL
TELECOMMUNICATIONS CONSORTIUM, INC.

By: /s/
John B. Schwartz, President
P.O. Box 6060
Boulder, CO. 80306
(303) 442-2707

Dated: December 18, 1992

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[7] The irony here is that if the Commission adopts the suggestions of the more extreme cable commentators, DAETC and other leased access providers could end up paying the cost of private censorship of programming which Congress did not intend to prohibit.

FCC Caption Omitted

REPLY COMMENTS OF THE MOTION PICTURE ASSOCIATION OF AMERICA, INC.

The Motion Picture Association of America, Inc. ("MPAA") respectfully submits its reply to comments filed in the above-referenced proceeding.

MPAA represents seven leading U.S. producers of motion picture and television programming. As program providers, MPAA's members are potential users of leased access facilities, directly or indirectly.

In the instant proceeding, the Commission proposes to adopt regulations dealing with, *inter alia*, restricting access by children to "indecent programming" on leased access channels of cable systems, as mandated by Congress in the Cable Consumer Protection and Competition Act of 1992 ("1992 Act"). We confine these reply comments to that portion of the proceeding.

We begin by declaring our agreement with the nearly universal view of the commenting parties that the entire censorial regime imposed by Section 10 of the 1992 Act and to be implemented in this proceeding is unconstitutional. The unobjectionable goal of protecting the child audience from exposure to unsuitable materials simply canno justify these new highly intrusive and speech-restrictive provisions. Children are already protected under federal and state obscenity laws under "harmful to minors" provisions.[1]

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[1] The exhibition of material, including any program delivered on a cable television system, *to a minor* may be proscribed only if it is "harmful to minors," which requires a finding that the program depicts nudity, sexual contact, sexual excitement, or sadomasochistic abuse *in a manner which* "predominantly appeals to the prurient, morbid, or shameful interests of minors, which is patently offensive to prevailing standards in the adult

(continued...)

Additionally, children in households with cable television have been protected for years by the federal requirement that lockboxes be provided to subscribers upon request.[2]

Pending the inevitable court challenges that the operation of Section 10 will generate, the Commission must take every step necessary to minimize the harm that the statute and new regulations will cause to the dissemination of First Amendment-protected speech. The Commission must provide to cable operator/lessors and to programmer/lessees the greatest possible clarity and certainty in the implementation of the requirements of Section 10. While the Commission cannot cure the overbreadth of the statute through interpretation, it must at least seek to mitigate the harm.

Furthermore, the Commission must interpret the requirements of this section in a manner not inconsistent with Congress' other expressed intention: to promote a diversity of viewpoints through leased access.[3] Congress has again expressed its commitment to leased access through requirements in Section 9 of the 1992 Act that are intended to encourage leased access use. By promoting

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[1](...continued)
community concerning what is suitable for minors and which is utterly without redeeming social importance for minors." *Ginsberg v. New York*, 390 U.S. 629 (1968).

Regulations pertaining to restricting an adult's access to material delivered via cable television face similar constitutional scrutiny: that materials can only be prohibited "if taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value. . ." *Miller v. California*, 413 U.S. 15, 21 (1973). The more recent U.S. Supreme court ruling in *Pope v. Illinois*, 481 U.S. 497 (1987), affirmed the *Miller* test, specifying that the proper inquiry in an obscenity prosecution is whether a "reasonable person," as opposed to the "community," would find that the material possesses serious value.

[2] 47 U.S.C. Sec. 544(d)(2)(A).

[3] The First Amendment rationale for leased access is summarized in the comments of the Alliance for Community Media et al. at 3 ff.

unwarranted censorship or self-censorship, or by burdening leased access users with unjustified costs or potential liability, these new rules could have the effect of chilling the use of leased access channels, which is plainly unconstitutional.[4] It would be unfortunate indeed were the Commission to interpret its obligations in a way that discourages the freedom of expression that leased access was intended to foster, and precipitates a constitutional challenge.

I. Definition of "Indecent Programming"

In attempting to define "indecency," the Commission is once again confronted with an extraordinarily difficult, delicate and ultimately futile challenge. Recent controversies over alleged "indecent" broadcast programming suggest the grave dangers inherent in attempting to regulate constitutionally-protected speech, and show the need for great clarity and certainty in any regulations adopted by the Commission. The potential financial liabilities, harm to reputation, and harm to First Amendment interests that could flow from violations of such regulations are extremely serious.

These considerations compel the adoption of a narrow, uniform and workable definition of "indecent programming" which should govern both in the context of (i) any "voluntary policy" on non-carriage of "indecent programming" that a cable operator may choose to adopt and (ii) what programming a cable operator who does not elect to bar "indecent programming" must relegate to "blocked" channels. The importance of uniformity is recognized by the National Cable Television Association ("NCTA"), which urges that the definition of "indecency" governing what a cable operator may choose to prohibit and the definition for purposes of

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[4] The Supreme Court has ruled many times that laws that, by creating the fear of legal consequences, promote self-censorship violate the First Amendment as much as laws that directly ban certain speech. See *Smith v. California*, 361 U.S. 147, 154 (1959).

determining what programming may be relegated to a "blocked" channel "should be the same."[5]

We concur with the view of Time Warner Entertainment Company, L.P. ("TWE") that the definition should incorporate a community standard "for the cable medium," that "the [appropriate] standard is that of the 'average cable viewer' on a nationwide basis. . .", and that the determination of whether any content is "patently offensive" requires judgment "within the context of the whole program and the merit of the work."[6]

Any definition of "indecent programming" must also recognize the distinct technological and commercial differences between cable television and other electronic media. Cable is neither so ubiquitous, readily accessible or intrusive as the broadcasting or telephone media. Moreover, as noted above, the cable industry is already under an obligation to provide "lockboxes" to parents upon request. In view of these and other factors, we believe a narrower definition of "indecency" than is applied to those media can be fully justified.

Any adjudicatory body attempting to apply this definition must also consider how the content in question compares with other content on non-leased access channels. Any new regulations must crate a presumption that any program material of a kind or type similar or identical to that which might appear on a non-leased access channel, and which would not be found "indecent," should not be deemed "indecent" for purposes of the leased access

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[5] NCTA at 7. We note the valuable role that NCTA has played in promoting the adoption of voluntary uniform industry standards in such areas as customer service, and believe such an effort would be appropriate in this context. The cable industry should be encouraged to adopt consistent industry-wide policies as to *both* certification requirements *and* voluntary exclusion of "indecent programming" in order to give fair notice to those who would use leased access facilities and to avoid a content-based balkanization that could render leased access useless for those seeking a national or regional audience.

[6] TWE at 6-8.

regulations. Absent such a standard, one must presume that the Congress has chosen to discriminate against leased access programming based on the identity of the programmer, not based on the alleged injurious nature of the program content for a child audience, which would only compound the constitutional infirmity of the new rules.

Finally, the Commission must "clarify that all state and local franchise authority regulations, as well as specific franchise agreement provisions, that are inconsistent with the Act and the implementing regulations are preempted."[7]

In summary, the Commission must adopt a national standard of indecency, must ensure that the definition is narrow, workable and non-restrictive of permissible speech as possible, and must preempt state and local regulation of content based on the same or similar concerns about the child audience. The Commission should also encourage the cable industry to promote uniformity in application of these standards. While a definition incorporating these elements would not necessarily pass constitutional muster, it would at least be somewhat more consistent with Supreme Court standards than that proposed in the Notice of Proposed Rulemaking.

II. The "Single Channel" Requirement

In the instant proceeding, the Commission must interpret what Congress meant when it gave the cable operator the option of putting "indecent" programming on a "single channel. We support the argument by Time Warner Entertainment Company, L.P., that

> Congress' clear intention in passing this provision was to limit children's access to indecent programming, and not necessarily to limit the amount of indecent programming to that which may fit on one channel. The Commission, therefore, should make clear that cable operators may, if they choose, place indecent commercial use programming

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[7] Continental Cablevision at 6.

on more than one channel as long as any channel that is designated for indecent programming is blocked.[8]

Even if the Commission were not persuaded by that rationale, there are technological developments which may require a more expansive view. Many cable operators are now on the verge of introducing signal compression technologies which could increase the video carriage capacity of a standard 6 MHz channel by anywhere from four to ten times. As such technologies are introduced, the Commission should give the cable operator greater latitude in satisfying the spirit of the statute. Thus, even if the Commission determines that by "single channel" Congress meant a single 6 MHz block of spectrum, the Commission should presume that the cable operator who confines "indecent" programming to such multiple compressed channels (i.e., the several video channels compressed within the space of the single 6 MHz channel), where each of the compressed channels is otherwise subject to blocking, is operating within the intent of the statute.

III. Notice and Indemnification Requirements

We begin by reiterating our strenuous opposition on constitutional grounds to the entire censorship scheme imposed by Section 10 of the 1992 Act. Regulations requiring a First Amendment-protected speaker to self-censor or that impose, directly or indirectly, substantial potential liabilities for such protected speech constitute a direct prior restraint. However, for the purpose of assisting the Commission to mitigate the First Amendment harms of Section 10, we offer the following comments.

Each cable operator should have in place within a reasonable period of time its voluntary policy on the carriage of "indecent programming," and its compliance plan for carriage of such programming on "blocked" channels. We believe an acceptable time period would range from 120-180 days from the effective date of the new regulations.

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[8] TWE at 9.

Once the operator has taken the technical and other steps to accommodate requests for access to such a channel, the lessee should face no further delay. If the absolute right of a cable operator to voluntary bar all "indecent programming" from its system is indeed constitutional, and if an operator chooses not to exercise this right, it should be prepared to carry any non-obscene programming on its "blocked" channels on very limited notice. The seven days' notice proposed by the Commission should be an absolute maximum. Lessees should also be permitted to provide "blanket notification" for multiple or regularly-scheduled programs.

The cable operator should be given a reasonable period of time to satisfy subscriber requests for blocking of service. However, the time for satisfying such requests should have no bearing on the availability of the leased access channel to the lessee. If an operator wishes to ensure that subscribers are given satisfactory notice of their right to block certain channels, the operator can provide notice to existing subscribers during the 120-180 day implementation period described above, or to new subscribers at the time of sign-up.

To further mitigate the effects of unconstitutional self-censorship, the Commission must take additional steps.

First, a lessee should be permitted, but should not be required, to provide written notice to the cable operator of any programming which the lessee believes may be found to be "indecent."[9] Requiring that such certification be in writing would amount to a Fifth Amendment violation.[10]

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[9] In the event that written notice is provided, the time period for record retention should not be more than 30 days from date of carriage, and the time period within which a complaint may be filed against an operator or programmer should be no longer than the record retention period.

[10] We do not here address questions of certification of, or liability for, carriage of "obscene" programming because the MPAA member companies neither produce nor distribute programming that would violate any constitutionally valid definition of "obscenity."

Second, the Commission can better satisfy the purposes of the Act while reducing the damage to constitutional rights by permitting any lessee simply to request carriage on a "blocked" channel of *any* program.[11]

The cable operator has the absolute right not to carry *any* "indecent programming" on its leased access channels and, in adopting such a policy, will in fact bear editorial responsibility for its decision to exclude. If the cable operator waives that right, the operator must then ensure, based on information received from the lessee, that any "indecent" leased access programming is regulated to a "blocked" channel. This can be achieved *without* requiring the lessee to "certify" that programming is "indecent" — which will likely prove an impossible task — by simply allowing any lessee to request carriage on a "blocked" channel of any programming whatsoever.

The cable operator can alleviate any remaining risk by requiring indemnification from *all* lessees against any liability flowing from the transmission of obscene or indecent programming, or permitting lessors and lessees to determine by contract who may bear certain specific costs of compliance with Section 10. The Commission must ensure that such requirements are not unreasonable and do not exist for the primary purpose of discouraging legitimate use of leased access channels. The Commission must also take any such requirements fully into account in establishing terms and conditions for leased access use, under regulations to be adopted pursuant to Section 9 of the 1992 Act.

Any disputes between lessors and lessees as to the requirements of these new regulations should be subject to expedited review by the Commission.

Finally, we support the position of cable industry commenters that cable operators should "retain the flexibility to use any

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[11] We believe that such an approach is as consistent with the requirements of the statute as the recommendation by Time Warner Entertainment (and discussed above) that the Commission interpret the "single channel" requirement more broadly.

reasonable method of blocking subscriber access that satisfies the goals of Section 10," including partial blocking of mixed-use channels.[12]

IV. Sufficiency of Notice of Proposed Rules

The record in this rulemaking demands that the Commission move with great caution in adopting rules which will impact First Amendment-protected speech. Due to the extraordinary constitutional delicacy of the issues at hand, and despite the tight statutory timeline imposed on the agency, the Commission cannot conclude the instant proceeding without subjecting a final set of proposed rules, and its constitutional analysis underlying such rules, to an additional round of public comment. Respect for the First Amendment demands no less.

Respectfully submitted,

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DATED: December 21, 1992

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[12] See, *e.g.*, Tele-Communications, Inc. at 12 ff.

Caption Omitted

REPLY COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS, NATIONAL LEAGUE OF CITIES, UNITED STATES CONFERENCE OF MAYORS, AND THE NATIONAL ASSOCIATION OF COUNTIES.

The National Association of Telecommunications Officers and Advisors, the National League of Cities, the United States Conference of Mayors, and the National Association of Counties (collectively, "Local Governments") submit these reply comments in the above-captioned proceeding.

I. INTRODUCTION

The Federal Communications Commission ("Commission") has proposed a reasonable method of implementing Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). In general, the rules strike an appropriate balance between Congress' desire that cable operators be permitted to limit certain programming on access channels, and provisions in the Cable Communications Policy Act of 1984 ("1984 Cable Act") that prohibit cable operators from exercising editorial control over public, educational and governmental ("PEG") access and leased access channels. *See* 47 U.S.C. 531(e) and 532(c)(2).

Local Governments recommended in their initial comments, however, that the Commission take into account the unique role of PEG channels in permitting members of the public and others to provide important programming in the public interest and encouraging the free flow of information among all segments of the community. In particular, Local Governments recommended that the Commission allow PEG providers to: (1) make blanket, rather than program-by-program, certifications; and (2) certify that they have exercised reasonable efforts to ensure that their programs will not contain obscene or otherwise proscribed material. Finally, Local Governments recommended that disputes between cable

operators and programmers be resolved in the first instance by the judicial system.

Local Governments urge the Commission not to adopt proposals by commenters that would upset the careful balance between the 1984 and 1992 Cable Acts, and would increase the administrative and financial burdens on local governments, subscribers and PEG and leased access programmers. In particular, Local Governments urge the Commission not to adopt proposals that would. (1) grant cable operators editorial control over the content of PEG and leased access programming; (2) impose the cost of complying with the Commission's rules on programmers or subscribers; (3) unduly burden members of the public and others that desire to distribute programming over access channels; and (4) restrict the ability of local governments to regulate the programming on PEG channels, and regulate obscene or indecent programming.

II. DISCUSSION

A. Cable Operators Should Bear the Costs of Complying with Section 10 of the 1992 Cable Act

Cable operators should bear the costs of complying with Section 10 of the 1992 Cable Act. Nothing in Section 10 suggests that such costs should be passed directly on to cable subscribers, or imposed on leased or PEG access users or subscribers.[1]

The 1984 and 1992 Cable Acts impose a number of obligations on cable operators, including customer service standards, technical standards, equal employment opportunity reporting requirements, and other requirements. Nothing in these provisions suggests that a cable operator should be able to directly pass on compliance costs to cable subscribers. Section 623 of the 1992 Cable Act identifies the categories of costs that must be included in establishing rates; the cost of complying with Section 10 is not identified as a recoverable cost.

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[1] *See, e.g.*, Comments of Tele-Communications Inc. at 5, Cox Cable Communications at 10-11, Continental Cablevision, Inc. at 10-11, and the Community Antenna Television Association, Inc. at 7.

The absence of language in the 1992 Cable Act permitting a cable operator to "pass through" compliance costs onto programmers or subscribers makes clear that Congress intended for a cable operator to bear such costs, just as it must bear the costs of complying with other provisions in the 1984 and 1992 Cable Acts.

B. Cable Operators Are Prohibited from Pre-Screening Programming

The Commission should not adopt regulations allowing cable operators to pre-screen or monitor the content of access programming to determine if it is indecent or obscene.[2] The 1984 Cable Act explicitly prohibits cable operators from pre-screening or monitoring programming to ensure that it does not contain such material. *See* 47 U.S.C. 531 ("a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section"); 47 U.S.C. 532 ("a cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming"). Moreover, pre-screening by cable operators pursuant to regulations established by the Commission would have serious first amendment implications.

The certification process proposed by the Commission, along with immunizing a cable operator from penalties the Commission might impose for violations of its rules, should provide cable operators sufficient assurance that prohibited programming will not be carried on their cable systems and that, if such programming is inadvertently carried, the Commission will not penalize cable operators that in "good faith" complied with the Commission's regulations.

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[2] *See, e.g.*, Comments of the National Cable Television Association at 9.

C. The Commission Does Not Have the Authority to Preempt Local laws and Franchise Agreements

The Commission should not preempt state and local obscenity and indecency laws, franchise provisions, and provisions in contracts between cable operators and public access organizations that are "inconsistent" with the Commission's rules or address the same issues addressed by the Commission's rules.[3]

Congress did not grant the Commission the authority to preempt state and local laws, and franchise and contract provisions, in this area and there is no language in the 1992 Cable Act's legislative history to suggest that this was Congress' intent. Congress could have included a preemption provision in the 1992 Cable Act if Congress had intended for the Commission to preempt state and local regulation in this area. In the absence of such language in the 1992 Cable Act, the Commission should not interfere with the operation of state and local laws and bargained-for franchise and contract provisions. Questions regarding whether a state or local law or franchise provision is preempted by federal law will more appropriately be decided by a court on a case-by-case basis.

D. Local Governments and Programmers Should Not Be Required to Provide Indemnification to Cable Operators

The Commission should not require local governments and cable programmers to provide indemnification, indemnification insurance, a bond, letter of credit or similar protection, to cable operators as a condition of carriage on access channels.[4] Moreover, local governments should not be required to indemnify cable operators for lawsuits challenging a cable operator's decision

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[3] *See, e.g.*, Comments of Continental Cablevision, Inc. at 6-8, the National Cable Television Association at 12, and Time Warner Entertainment Company, L.P. at 28.

[4] *See, e.g.*, Comments of Blade Communications, Inc., *et. al.* at 12, the National Cable Television Association at 15 and Time Warner Entertainment Company, L.P. at 19 and 23.

not to carry programming that a local government deemed obscene or indecent.[5]

The imposition of an indemnification requirement on local governments would undercut the purpose of — and may violate — the damages immunity provision in Section 24 of the 1992 Cable Act. Section 24 demonstrates Congress' intent to grant local governments immunity from monetary damages, costs and attorneys fees in legal challenges to their authority to regulate cable systems. The Commission should not allow cable operators to recover such damages, costs and fees indirectly by imposing on local governments an indemnification requirement.

Moreover, the 1992 Cable Act does not authorize the Commission to impose an indemnification requirement on either local governments or access programmers. In addition, an indemnification requirement would be inconsistent with state constitutions and statutes that prohibit the imposition of open-ended indemnification requirements on local governments. *See, e.g.*, 31 U.S.C. 1341 (limits indemnification obligations of the federal government and the District of Columbia).

Finally, indemnification requirements would have a "chilling effect" on the number of programmers that could use PEG or leased access channels, and on the regulation of such channels by local governments. Congress enacted leased and PEG access channel provisions in 1984 to promote its goal of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. 521(4). Congress reaffirmed this purpose in the 1992 Cable Act by: (1) authorizing franchising authorities to deny a franchise request if an applicant does not plan to provide "adequate" PEG channels, facilities or support, 47 U.S.C. 541(a) (as amended by the 1992 Cable Act); and (2) requiring the Commission to establish reasonable rates, terms and conditions of leased access. 47 U.S.C. 532 (c) (as amended by the 1992 Cable

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[5] *See, e.g.*, Comments of Time Warner Entertainment Company, L.P. at 27.

Act). The Commission would undermine these Congressional policies and mandates if it enacted regulations that would unduly inhibit a programmer's use of such channels. Such a requirement may not be a "reasonable" obligation to impose on programmers, *see, e.g.*, 47 U.S.C. 532(c)(2)(ii) (as amended by the 1992 Cable Act) — particularly on users of PEG channels who may not have the resources to provide indemnification to a private cable operator.

E. Courts Should Resolve Disputes Between Cable Operators and Programmers

Several commenters suggested that either the Commission[6] or local governments[7] resolve disputes between cable operators and programmers. Others have suggested that a cable operator's decision on whether a program should be carried should be final and not subject to review.[8]

Local Governments oppose suggestions that a cable operator's actions not be reviewable. However, Local Governments believe that neither the Commission nor a local government should resolve such disputes. As stated in our initial comments, Local Governments believe that such disputes should be resolved by the courts, which ultimately must decide the constitutional issues that Section 10 may raise. Dispute resolution by either the Commission or local governments would merely delay a decision by a court on these important issues.

III. CONCLUSION

Local Governments believe that the Commission's approach is sound with respect to implementing Section 10 of the 1992 Act. The Commission should not implement suggestions by commenters that would undermine this approach. In particular, Local Governments urge the Commission not to adopt regulations that: (1) grant cable operators the authority to pre-screen access

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[6] *See, e.g.*,Comments of Cox Cable Communications at 12.

[7] *See, e.g.*, Comments of Time Warner Entertainment Company, L.P. at 24-25.

[8] *See, e.g.*, Comments of Tele-Communications Inc. at 18.

programming; (2) impose the cost of complying with the Commission's rules on programmers or subscribers; (3) impose undue burdens on programmers; and (4) restrict the ability of local governments to regulate PEG channels and enforce laws and franchise provisions regulating indecent or obscene programming. Moreover, Local Governments believe that disputes between cable operators and programmers should be resolved in the first instance by the judicial system.

Respectfully submitted,

/s/

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December 21, 1992

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REPLY COMMENTS
OF THE NATIONAL CABLE TELEVISION ASSOCIATION

* * *

As NCTA pointed out in its initial comments, these changes to existing law only serve to highlight the First Amendment problems that are inherent in the Act's public and leased access provisions. To require cable operators to carry material — indecent or otherwise — that they might otherwise choose not to carry fundamentally interferes with the protected exercise of editorial discretion. But granting cable operators discretion to prohibit only certain types of programming that the *government* views as "indecent" or unfit for carriage raises First Amendment problems, too. To single out some non-obscene programming as "indecent" and therefore subject to discriminatory treatment is to engage in constitutionally suspect content regulation. The law continues to burden cable operators with restrictions on their editorial discretion, but now it also imposes a form of content regulation on providers of access programming.

A number of commenting parties, primarily representing access programmers, are quite sensitive to the First Amendment implications of governmental efforts to restrict "indecent" programming on cable television. But these parties are, at the same

time, wholly oblivious to the First Amendment implications of *forcing* cable operators to carry such programming. Their solution — forcing cable operators to carry such programming, but also forcing them to provide all subscribers who do not want to watch such programming with lockboxes or other blocking devices — only exacerbates the unconstitutional burdens of access requirements.

* * *

Respectfully submitted,

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

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December 21, 1992

FCC Caption Omitted

REPLY COMMENTS OF
'Ōlelo: The Corporation for Community Television

'Ōlelo: The Corporation for Community Television ('Ōlelo), urges the Commission to reconsider the proposed rules for regulating programming content on access channels. It is clear from previous actions, current court challenges and the comments filed by the cable industry, that the concept of creating open public access channels has been under constant challenge by the cable industry. The dominant argument posed by the cable operators is that they should not have to carry speech that they cannot control as their own speech. That the cable operator is a first amendment speaker and such obligations should be considered unconstitutional.

If cable companies are given broad authority to implement the regulations proposed by the FCC pertaining to programming access channels, many of them will exercise that authority with such broad impact as to include preventing protected speech and potentially eliminate open access channels altogether.

Clearly this was not the intent of the act. Instead, consistent with the comments by the Alliance for Community Media and others, the FCC should adopt rules that carefully and narrowly define the circumstances under which access programming can be banned.

There are several good reasons why these rules should be reconsidered aside from the constitutional and statutory reasons identified in the comments filed by the Alliance for Community Media.

In Hawai'i, State policy was established that the responsibility for all public access programming was the speaker and not the cable operator nor non-profit access programming facilitator. This policy was created in law indemnifying the non-profit operator from speech that was carried on the access channels. The speaker certifies that their program will not contain any illegal speech. This

policy and procedure has worked well for Hawai'i and relies upon existing laws to prosecute those who place unprotected speech onto the public access channels. There is no compelling reason for the FCC to intervene in the State policy and contractual agreement established between the State and the cable operator and the State and 'Ōlelo.

In cases were cable subscribers have objected to access programming being available in the home, our cable operators have provided lock boxes or filtering devices that remove any undesired channels, whether they are access or partially scrambled pay services such as Playboy. Again, this approach has worked without imposing the burdens of regulations that would chill speech such as pre-screening.

Pre-screening of programming, whether by the cable operator or the non-profit facilitator would pose a significant cost and logistical burden. Highly competent staff with sound legal judgement would have to be hired to review each program requiring long lead times for submission of tapes. This would eliminate any live interactive programming and any programming that would be of a timely nature. This would mean for us, the elimination of educational distant learning programming that must be carried live for student interaction.

In summary, the proposed rules must be reconsidered. The Commission should reject proposals whereby the cable operator is granted broad authority to censor PEG programming. We urge the Commission to consider and adopt the proposals made by the Alliance for Community Media.

/s/
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Executive Director

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December 18, 1992

FCC Caption Omitted

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

Viacom International Inc. (hereinafter "Viacom") by its attorneys, hereby submits its Reply Comments in response to the above-captioned Notice of Proposed Rulemaking. Viacom owns and operates cable television systems and, accordingly, will be directly affected by the outcome of this proceeding.

Viacom shares the concerns of many parties filing comments as to the serious First Amendment problems raised by the statutory provisions giving rise to this proceeding and the unavoidable practical difficulties that any implementing regulations must address. The purpose of this reply is to support approaches suggested by other comments that would minimize burdens and allocate responsibility for compliance in as fair and workable manner as possible given the fundamental flaws of the statutory requirements. Specifically, Viacom supports a system of certification as the starting point of the cable operator's response to requests for channel time by either commercial channel lessees or PEG access programmers. In addition, Viacom believes that prior to airing an access program, the operator must have the right to be indemnified by the programmer against liability stemming from airing programming on the access channels.

Legal and Practical Problems of Section 624(i) of the Cable Act

Viacom agrees with the many commenting parties who have pointed out constitutional flaws and severe practical problems in the mechanism Congress chose to restrict children's access to indecent programming and to keep obscenity off of cable channels. The new statutory provisions are a travesty for everyone involved in access. The rules mandated by the statute will subject cable operators to responsibility and liability for the content of programming over which they otherwise are intended to have no editorial control. Furthermore, however the Commission implements the law, it will

be almost impossible to avoid interfering with legitimate First Amendment rights of programmers who utilize the access channels.

Congress and the Commission already have provided sufficient protection for children by mandating availability of parental control devices. *See* 47 U.S.C. § 544(d)(2)(A) and 47 C.F.R. § 76.11. Letting parents decide what their children should watch and giving them the technical means to implement those decisions certainly seems a more effective and constitutionally less restrictive way to achieve Congress' objective than involving cable operators and programmers in an extremely burdensome if not impossible task.

Recognizing, however, that Congress has mandated further Commission action, Viacom offers the following suggestions, which are intended to minimize the potential burdens of compliance.

Viacom's Recommendations

1. Standard for Indecent or Obscene Material. Viacom believes that given the unique characteristics of the cable medium, the only fair and workable test of "contemporary community standards" for obscenity or indecency must be based on the relevant "community" of cable subscribers. Because viewers must take the action of subscribing to cable service in order to view its programming, it is neither relevant nor appropriate to base the determination of whether material is legally indecent or obscene on the standards of individuals who are not subscribers to the service. As other comments have suggested, a single national standard is both appropriate and effective.

2. Prior Certification and Response: Like many of the commenting parties, Viacom believes that the decision of how to handle potentially indecent or obscene material in both leased and PEG access programming should start with certification. Programmers seeking to use access channels should be required to certify, in writing and in advance, whether the programming *does* or *does not* contain indecent or obscene material.[1] It would not be

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[1] In the case of PEG access where an intermediate entity such as a nonprofit access group or governmental entity runs the channel(s), that (continued...)

unduly burdensome to place this responsibility on the programmer, which, in fact, is in a better position to know the content. The Commission has relied on programmer certification in other contexts for this very reason. (*See, e.g.*, 47 C.F.R. § 76.225, *Policies and Rules Concerning Children's Television Programming*, 6 FCC Rcd 2111, *clarified on recon.*, 6 FCC Rcd 5093, 5697-98 (1991).

(a) If a leased access programmer refuses to execute the certificate, the operator has no choice but to treat the programs as if they contain indecent or obscene material.[2] Accordingly, the programmer would be justified in keeping the programming off the system altogether. Moreover, the potential presence of obscene material and the penalties for distribution of such material in Sections 558 and 559 of the Act should be deemed grounds for keeping the programming off whenever confronted with a programmer's refusal to certify.

(b) If a leased access programmer certifies that the programming *does* contain *indecent* material, the operator either may keep it off the system pursuant to a written published policy or may place the programming on a sequestered, blocked channel to the extent that sufficient channel space is available[3]. If, on the other hand, the programmer certifies that the programming does contain *obscene* material, the cable operator may keep the programming off the system.

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[1](...continued)
group should be required to certify to the operator and, in turn, also would have the right to obtain certification from channel users.

[2] Cable operators should be entitled to rely on certification and should not be required to prescreen all access programming, because doing otherwise would entail great burden and expense, which, for PEG, could be reflected in higher basic subscriber rates; however, operators should not be prohibited from prescreening if they choose.

[3] Viacom believes that operators be required to block no more than one of the channels designated for leased access for the purpose of distributing access programming pursuant to this provision.

(c) If a leased access programmer certifies that the programming *does not* contain indecent or obscene material, the cable operator may deal with the channel request in its usual manner, with the result that such program could be aired on the system on a regular, unblocked leased channel. Of course, if the operator has independent grounds for believing that the programming contains indecent or obscene material notwithstanding the certification (for example, through voluntary prescreening, should the operator in its sole discretion elect to do so), the operator should be able to sequester the channel, or if only an isolated instance of indecent material, to block its transmission if sequestering is impractical. Again, however, the operator would not be in violation for relying on a false or inaccurate certificate in accordance with its normal procedures, because there is no *obligation* to prescreen.

(d) A similar approach should be followed for PEG access. Programmers seeking to use PEG channels should be required to certify, in writing and in advance, that their programming *does* or *does not* contain material of the sort prohibited by Section 532(c) of the Act. As in the case of leased access, when confronted with a request for PEG channel use, the operator's response depends on whether the programmer certifies that the programming *does* contain prohibited material; certifies that the programming *does not* contain prohibited material or refuses to certify.

3. Indemnification: Because the operator could be subject to serious liability in the event of an inaccurate or false certification, it is only fair that cable operators have the right to request indemnification from both leased channel and PEG programmers as part of the certification or channel use agreement. The operator should have the right to obtain appropriate indemnification *before* a program is aired. In addition, the operator should have the right to require reasonable assurance (through demonstration of a programmer's financial qualifications, insurance, bonds, or letters of credit, for example) that the programmer executing the certificate and giving the indemnification is not judgment proof. Absent such indemnification and assurance, the operator has a right to sequester the program or keep it off.

Conclusion

Restrictions on access channel programming in the 1992 Act could impose untenable burdens on everyone involved. The Commission's rules should be aimed at clarifying the operator's obligations in determining the appropriate treatment for access programming. Another important objective for the rules is a fair and effective apportionment of responsibility for the consequences of noncompliance. The Commission has the opportunity to advance both of these objectives by adopting Viacom's recommendations.

Respectfully submitted,

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December 21, 1992

FCC Caption Omitted

COMMENTS OF NEW YORK CITIZENS COMMITTEE FOR RESPONSIBLE MEDIA

The New York Citizens Committee for Responsible Media ("NYCCRM") respectfully submits these reply comments in this proceeding to consider the Commission's proposed rule implementing Section 10 of the Cable Consumer Protection and Competition Act of 1992 ("Cable Act of 1992").

Section 10 would:

A) allow any cable operator to enforce a written and published policy prohibiting any leased access programming which they "reasonably believe" to contain "patently offensive" descriptions or depictions of sexual or excretory activities or organs;

B) require cable operators to place all "indecent" programs, not otherwise prohibited, on a single, blocked channel, to which access is available only through a written subscriber request.

C) require leased access programmers to inform the cable operator if their program contains "indecent" material;

D) allow cable operators to prohibit any programming on public, educational, or government (PEG) access channels that contain "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct".

In addition, Section 10 holds Cable Operators liable for any programming that "involves obscene material" carried on mandatory access channels.

NYCCRM is a not-for-profit, citizens group concerned with issues of public access to the electronic media and media democracy. Its membership includes access producers, community

organizations, independent video and filmmakers, and interested viewers. In the 1980s, NYCCRM New York City during the cable franchising process for the outer boroughs (Brooklyn, Queens, Staten Island, and The Bronx) and the renewal franchising process for Manhattan. Many of its policy recommendations for PEG and Leased Access were adopted by the City as its negotiating position with cable operators. We continue to safeguard the access to the cable medium achieved here in New York City, and work to expand the access concept to new, competing delivery systems that are being introduced in the 1990s.

At the outset, NYCCRM questions the legislative intent of Section 10 of the Cable Act of 1992. This section was introduced during the Senate floor debate, without the benefit of the consideration of the relevant House and Senate Committees. Its primary sponsors were Senator Jesse Helms, (R-NC), who has a long record of attempts to censor the free expression of ideas, and Senator Tim Wirth (D-CO), whose re-election campaigns have always benefited from generous cable industry contributions.

NYCCRM concurs with the comments filed by The Alliance for Communications Democracy, et. al. ("ACD"), that Section 20 and the proposed rule violate applicable First Amendment principles. Nevertheless, NYCCRM recognizes the Commission's obligation to issue a rule implementing Section 10 and offers these brief reply comments to the initial comments on the proposed rule.

I. MANHATTAN PUBLIC ACCESS CHANNELS HAVE BECOME A VITAL PUBLIC FORUM FOR LOCAL EXPRESSION DESPITE CABLE OPERATOR INDIFFERENCE AND HOSTILITY.

As Manhattan Neighborhood Network ("MNN") observes (MNN Comments at 2), public access has existed in Manhattan for more than 20 years, until recently under the administrative control of the two franchised cable operators who serve Manhattan.[1]

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[1] Indeed, Manhattan was the first major urban area to be wired for cable. The Manhattan experience with public access thus preceded all other experience with cable public access in an urban setting.

MNN further notes that there are currently 590 public access programs offered on Manhattan cable systems, totalling 300 hours of programming per week (MNN Comments at 3). The diversity of that programming is evident from the programming schedule in the June/July 1992 issue of ACCESS MANHATTAN! (See Exhibit A.)

Manhattan's public access channels offer narrowcast programming for every racial and ethnic group living in that borough of New York City. There are, for example, public access programs for African Americans ("Flo Kennedy"), Hispanics ("Latinos En Accion"), Jews ("Jewish Task Force"), and Russian Americans ("Russian-American TV"). There are also public access programs that target Manhattan's sizeable gay population ("Out in the '90s: Gay News Network" and "The Closet Case Show"). Another public access program addresses the concerns of the disabled ("Disabled Hotline"). Many public access programs are devoted to arts and culture (*e.g.*, "Egg Cream Theatre" and "Dave Channon's Volcanic Video"). These include several programs that feature rap, dancehall reggae and world beat music (*e.g.*, "House of Rap" and "Viddyms Reggae & World Beat"). Finally, a number of public access programs address vital issues of local importance (*e.g.*, "Interfaith Assembly on Homelessness and Housing").

Collectively, Manhattan's public access channels serve programming needs largely ignored by Manhattan's franchised cable operators. Some public access programs even counter the cable operators' propaganda accompanying monthly bills to cable subscribers (*e.g.*, "Inter-Active TV with Jim Chladek").[2] These channels thus provide an important public forum for those who live in Manhattan.

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[2] Another example of how public access channels have enabled cable subscribers to counter cable operators' propaganda occurred several years ago on Long Island, where Cablevision had not renewed Madison Square Garden Network's carriage contract, thus depriving cable subscribers of Yankees' games. A group of subscribers produced a public access program countering Cablevision's version of its dispute with MSGN, which had aired on Long Island 12, Cablevision's local news channel.

The wealth of public access programming in Manhattan is even more impressive, when one considers the franchised cable operators' disinterest in promoting such programming. Over the years, for example, Manhattan Cable Television, Inc. ("MCTV"), the cable operator franchised to serve lower Manhattan during most of the 1970s and 1980s, never provided a studio for public access program productions nor did it list public access programs in its monthly printed guide for cable subscribers.[3]

To be sure, Manhattan's public access channels feature some sexually explicit programming. But such programming may have serious value for the local community. The Closet Case Show, first aired on public access channels in late 1984, has long promoted safe sex activity among gay men, often using explicit films of safe sex practices. A 1987 study sponsored by the Gay Men's Health Crisis concluded that such sexually explicit programming was often more effective than other techniques in discouraging risky sexual behavior. Various segments of The Closet Case Show have received critical acclaim from the gay community here and abroad. Despite the serious value of such programming, MCTV has regularly censored The Closet Case Show in violation of Section 611(c) of the Cable Communications Policy Act of 1984, 47 U.S.C. § 531(c), which precluded such assertion of editorial control. (See Exhibit C.)

The Commission is well aware that public access programs such as The Closet Case Show will almost certainly disappear from public (and leased) access channels if Section 10 of the 1992 Cable Act is implemented, notwithstanding the serious value of such programming. Just as broadcasters and cable operators have balked

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[3] MCTV also periodically preempted public access channel time to offer its own cable programming, in violation of its franchise agreement with New York City. On April 6, 1985, for example, it unlawfully preempted four public access producers during two prime-time hours to present The Nashville Network's live show from Radio City Music Hall. See Exhibit B.

at airing graphic anti-abortion ads,[4] cable operators will henceforth censor sexually explicit programming over access channels, even if such programming concerns core political speech.[5]

II. SECTION 10 AND THE PROPOSED RULE VIOLATE APPLICABLE FIRST AMENDMENT PRINCIPLES.

NYCCRM agrees with ACD that Section 10 of the 1992 Cable Act and the proposed rule violate basic First Amendment principles. Nevertheless, we believe that some of ACD's analysis requires elaboration and clarification.

A. PUBLIC ACCESS CHANNELS ARE TRADITIONAL PUBLIC FORA.

ACD correctly observes that public access channels are locally created public fora, but suggest that they are designated rather than traditional public fora. (ACD Comments at 34-38.) To the contrary, we believe that public access channels fall in the latter category of public fora.

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[4] *FCC Asked to Rule Fetus Image Indecent*, Broadcasting, Aug. 3, 1992, at 57; *Abortion Political Ad Question Back at FCC*, Broadcasting, Sept. 7, 1992, at 30; *Harbor for Abortion Ads*, Broadcasting, Nov. 2, 1992, at 26; *FCC Drifts Toward Safe Harbor for Abortion Ads*, Broadcasting, Nov. 9, 1992, at 48; *Ga. Anti-Abortion Ads Spark Fireworks*, Multichannel News, July 13, 1992, at 20; *St. Louis Systems Run Anti-Abortion Ads*, Multichannel News, July 27, 1992, at 38; *Milwaukee Airs Anti-Abortion Ads*, Multichannel News, Oct. 19, 1992, at 20.

[5] There is a long tradition of mixing sexually explicit materials with core political speech. During the French Revolution, for example, a print entitled *Grand DeBandement de L'armee Anticonstitutionelle* appeared in an ultra-royalist newspaper. It portrayed the royalist army dispersing because several women with revolutionary sympathies had lifted their skirts and disrespectfully displayed their buttocks. The title contains several puns deriving from the various meanings of "debander," which include "to disband" and "to lose one's erection." V. Cameron, *Political Exposures: Sexuality and Caricature in the French Revolution* in *Eroticism and the Body Politic* 90-95 (L. Hunt ed. 1991).

Traditional public fora consist of "places which by long tradition or by government fiat have been devoted to assembly and debate . . . ." *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The clearest examples of such public fora are public streets, sidewalks and parks. *Id.*; *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). But the category is not limited to such "quintessential" public fora. *Perry*, 460 U.S. at 45. Traditional public fora may include "'other similar public places.'" *Hudgens v. NLRB*, 424 U.S. 507, 515 (1976), quoting *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315 (1968), *overruled on other grounds*, *Hudgens v. NLRB*, 424 U.S. 507 (1976). *See also United States v. Grace*, 461 U.S. 171, 177(198) (traditional public fora include "'public places' historically associated with the free exercise of oppressive activities, such as streets, sidewalks and parks" (emphasis added)). Moreover, the category is not static, since it includes public fora "clearly held in trust, either by tradition *or recent convention*, for the use of the citizens at large." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 815 n.2 (1984). Such "recent convention" may result from "government fiat." *Perry*, 460 U.S. at 45.

Public access channels clearly fall in the category of traditional public fora. Whether by "government fiat" or "recent convention," or both, these channels have typically been available to the public for oppressive activities since their creation. Indeed, in recognizing that "[p]ublic access channels are often the video equivalent of the speaker's soap box or the electronic parallel to the printed leaflet," H.R. Rep. No. 934, 98th Cong., 2d Sess. 30 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4667, Congress virtually equated public access channels to public streets, sidewalks and parks, where speakers address crowds on soap boxes and hand out printed leaflets.

The decision in *Missouri Knights of the Ku Klux Klan v. Kansas City, Mo.*, 723 F. Supp. 1347 (W.D. Mo. 1989), is not to the contrary. Plaintiffs there argued that Kansas City's public access channel was a traditional public forum. The court only assumed

"for the sake of argument" that the channel was merely a designated public forum. *Id.*, at 1352.

B. THE EFFECTIVENESS OF LOCKBOX DEVICES DISTINGUISH THE CABLE MEDIUM FROM BOTH THE BROADCAST AND TELEPHONE MEDIA.

ACD also persuasively argues that the unique features of the cable medium make the content-based, "indecency" regulation upheld for the broadcast medium, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), inappropriate for the cable medium. ACD Comments at 38-42. Not only is there no "captive audience" for cable service, *Sable Communications v. FCC*, 492 U.S. 115, 127-28 (1989), since one "must make the affirmative decision to bring [cable service] into his home," *Cruz v. Ferre*, 775 F.2d 1415, 1419 (11th Cir. 1985), but parents also have "the ability to protect children" from unsuitable cable programming through the use of a "'lockbox' or 'parental key'" available from cable operators. *Id.* at 1415, 1420.

ACD neglects, however, to point out that lock-out features are now included in addressable converters, at no additional charge. The Time Warner cable systems in Now York City, for example, advise cable subscribers in the local editions of *TV Guide*, that "[y]our convertor is equipped with a device that allows you to block out any program you do not wish your children to watch." (See Exhibit D.) Because every cable system will eventually be addressable, all cable subscriber will eventually have converters with lock-out features, enabling them to block offensive programming without additional charge.

The effectiveness of cable lockbox devices not only distinguishes the cable medium from the broadcast medium, as ACD notes, but also distinguishes it from the telephone medium, for which the Commission has found customer premises blocking devices to be ineffective in enabling parents to monitor their children's access to adult message services. *Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 554 (2d Cir. 1988), *cert. denied*, 488 U.S. 924 (1988). The court decisions which uphold more restrictive regulation of indecent telephone communications, id. at 557, *Dial Info Servs Corp. v. Thornburgh*,

938 F.2d 1535 (2d Cir 1991), *cert. denied*, 112 S.Ct. 966 (1992), are thus inapposite.

C. THE GROWTH IN ADULT PAY PER VIEW PROGRAMMING AMPLY DEMONSTRATES THE UNDERINCLUSIVENESS OF SECTION 10 AND THE PROPOSED RULE.

Recognizing a compelling governmental interest in the protection of minors from cable programming deemed unsuitable for viewing by their parents, we nevertheless agree with ACD that Section 10 and the proposed rules are underinclusive, given that they only concern sexually explicit programming on access channels (ACD Comments at 49-53). In reality, there is as much, if not more, sexually explicit programming on the other cable channels, including those dedicated to pay per view.

Many cable operators now offer at least one adult pay per view channel. Playboy at Night is currently available to 7.6 million addressable subscribers on 239 cable systems, while Spice (originally named Rendezvous) is currently available to 5 million addressable subscribers on 123 cable systems. *Database*, Cablevision, Dec 14, 1992, at 51. Both have experienced rapid growth since their launches only three years ago. *Id.*, Playboy at Night expects to double its current subscriber base within a year. *Playboy May Go to Around the Clock Format*, Multichannel News, June 29, 1992, at 6. While many cable operators initially offered Playboy at Night and Spice only during late night hours, some cable operators now offer these pay per view channels during daytime hours. *Id.*; *Keeping It Quiet*, Cablevision, April 8, 1991, at 16. The cable industry has become wildly enthusiastic about Playboy at Night, doubtless because it has generated over $50 million in revenues for cable operators. *Playboy Looks Good to Ops*, - Cablevision, June 1, 1992, at 12. The adult pay per view channel recently introduced a new show, "Secret Confessions and Fantasies," in which individuals described "their wildest sexual escapades — real or wished for — while the fantasies are reenacted by actors." *A(nother) New View of Playboy*, Cablevision, Nov. 30, 1992, at 22. Adult pay per view programming has proven to be so popular with cable operators and cable subscribers that two other

pay per view services have announced plans to launch adult pay per view channels. *Id. See also Request Television Eyeing an Adult Channel*, Multichannel News, Oct. 5, 1992, at 26.[6]

Given the dramatic growth in adult pay per view programming offered over cable channels, it is patently clear that Section 10 and the proposed rule — insofar as they purport to protect minors from programming which their parents deem unsuitable for viewing — is underinclusive. Simply put, the majority of sexually explicit cable programming is found on channels under cable operators' editorial control, not on access channels.

ACD suggest that the narrow focus of Section 10 and the proposed rule may reflect a bias against viewpoints expressed on access channels. (ACD Comments at 52-53.) We believe that it also reflects a willingness to protect cable operators from competition in the market for adult programming services. If cable operators are allowed to eliminate or restrict sexually explicit programming on access channels, there will be less competition for their own sexually explicit programming. Thus, cable operators may well censor sexually explicit access programming, but offer comparable programming on other channels.

CONCLUSION

NYCCRM agrees with ACD that Section 10 of the Cable Act of 1992 and the proposed rule (as best we can ascertain, given its broad and imprecise language) violate applicable First Amendment principles. They effectively grant private companies (cable operators) the power to act as public censors, a power traditionally reserved to government, and then only in very narrowly prescribed circumstances.

Censorship of access channels is unnecessary since technology has made it possible to fulfill the only legitimate government

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[6] The Time Warner cable systems in New York City now offer both Playboy at Night and Spice during daytime hours. As already noted, cable subscribers are advised that "[y]our converter is equipped with a device that allows you to block out any program you do not wish your children to watch." (See Exhibit D.)

interest, *e.g.*, which is to ensure that parents have the ability to protect their children from obscene and indecent programming on PEG and leased access channels. Furthermore, we feel that this technology, lockboxes, places the decision making power over children's viewing access where it belongs — *with parents*.

Allowing a cable operator to censor access programming is not only unnecessary but is also harmful to true diversity, conferring such power on cable operators grants an active and interested party the ability to harass PEG and leased access producers for a number of purposes:

1) to regain channel capacity that they can re-program for profit;

2) reduce competition for their own premium and pay per view adult programming; and

3) demand rate increases ostensibly to cover the technical costs of blocking channels or specific programs, and enforcement of censorship policies.

Ironically, adult pay per view channels, in which cable operators have a financial interest, would remain exempt from censorship, even though they raise the same parental concerns.

Given the vague criteria for censoring access programming, it seems inevitable that many disputes will arise. Public and leased access was created to give voice to economically and politically disenfranchised citizens, who have been shut out of the dominant commercial media. Access producers are dedicated citizens and entrepreneurs, often working in their spare time, with limited resources. Whatever methods the Commission adopts for settling disputes between cable operators and producers over censorship of programming will inevitably be unfair and ineffective, given the vast disparity of economic and legal resources available to the disputants. Many access producers will simply give up and not bother to produce shows. In any event, these disputes will create unnecessary delays in the cablecast of timely programs and seriously undermine the First Amendment goals of public and leased access.

NYCCRM urges the Commission to make lockboxes even more effective by encouraging access producers to provide descriptions of their programming prior to its presentation on access channels. Moreover, cable operators should be required to list access programs in all printed and electronic program guides. This will allow viewers to make informed viewing judgements, block whatever programming they deem necessary, or cancel their cable subscription. A review of lockbox provisions should be undertaken by the Commission to ensure their universal availability and cable operator promotion.

In conclusion, NYCCRM feels that these suggestions represent the least intrusive method for effectively addressing parental concerns, and the best way to ensure the continued viability of PEG and leased access, the people's voice.

Respectfully submitted,

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December 22, 1992

EXHIBIT D

Adults Only

(Parental Control Advised)

CHANNEL 62 **PLAYBOY At Night**

Now you can enjoy Playboy At Night's original programs and top quality adult entertainment for only **$4.95 per night** (8pm to 6am).

Watch for these great December highlights:

EDEN
INSIDE OUT
DIVORCE LAW
FRENCH KISSES
NAUGHTY GAMES
FOR A GOOD TIME CALL...

TO ORDER PER NIGHT (8pm-6am) call 1-800-379-6262 starting at 7pm or during show.

CHANNEL 63 **Spice**
7:30am - 3am

We offer a scintillating film every 90 minutes starting at 7:30am. This month order:

WACS
ALL THAT SEX
THE LAST RESORT
THE BAD NEWS BRATS
HEAVENLY HYAPATIA
and many more...

Edited for pay-per-view

TO ORDER call 1-800-379-6363 within one hour of start time. For daily titles and start time information about Spice films on Channel 63, please tune to the PreVue Guide (Channel 40). All adult films $4.95 each.

Channels Listed in the Manhattan Cable TV Edition

(CC) Black-and-white (CC) Color ... version

Broadcast Stations*

—New York City—

[illegible] WPIX (Prod) 11
[illegible] WNET (PBS) 13
[illegible] WNYE (PBS) 25
[illegible] WNJU (TEL) 46

—Long Island—

[illegible] WLIW (PBS) 21

—Paterson—

[illegible] WCTV (UHF) 12

Chs. 13, 21/24 and 25 schedule instructional programs during the school year.

Cable TV*

Cable Service Abbreviation—Manhattan Cable TV Channel Number.

[illegible] A&E Entertainment Network 37
[illegible] American Movie Classics 38
[illegible] Black Entertainment Television 57
[illegible] Bravo 54
[illegible] The Cartoon Network 77
[illegible] CBS/Fox Video Network 42
[illegible] CNN-TV 29
[illegible] Comedy Central 28
[illegible] C-SPAN 28
[illegible] The Disney Channel 53
[illegible] The Discovery Channel 37
[illegible] ESPN 24
[illegible] The Family Channel 47
[illegible] Galavision 72
[illegible] Home Box Office 33
[illegible] Lifetime 48
[illegible] Cinemax 45
[illegible] Madison Square Garden Network 10
[illegible] Madison Square Garden I 26
[illegible] Madison Square Garden II 27
[illegible] Music Television 49
[illegible] Nickelodeon 36
[illegible] The Movie Channel 71**
[illegible] SportsChannel 59
[illegible] SportsChannel America 27
[illegible] SportsChannel America 76
[illegible] Showtime 41
[illegible] TBS SuperStation 43
[illegible] The Nashville Network 49
[illegible] Turner Network Television 52
[illegible] USA Network 44

Pay-Per-View Channels

[illegible]

Daily listings in our programming section. Check This Week's Pay-Per-View.

[illegible] Fantasy All Night

See Daily listings, Movie Channels, Movie Guide and This Week's Pay-Per-View for details.

*VCR Plus + (Instant Programming). The numbers that appear above next to each broadcast and cable channel, as well as the PlusCode® numbers on most daily listings, are for the convenience of viewers who own VCR Plus + ® devices for VCR tuning. Owners of those devices should follow the directions in the owner's manual. Call 1-800-432-1-VCR for further information. VCR Plus + ® and PlusCode® are trademarks of Gemstar Development Corporation. PlusCode® numbers copyright 1992 GDC. All rights reserved.

Manhattan Cable TV also offers the following services. See the connection guide for optional information. The Bee and Video Hits One (MHz) cannot be received by most cable. Cable Satellite Public Affairs Network (C-SPAN) and C-SPAN 2 cover House and Senate sessions respectively, as well as Congressional hearings and public-affairs programming. The Cartoon Network is programmed entirely with cartoons. CNBC offers financial news, talk shows and talk shows. Court TV provides coverage of court trials nationwide. Documentary programming is available on Channel 74. El Entertainment Television highlights various aspects of the entertainment industry. Headline News provides continuous news updates. Home Shopping Network (Ch. 28) and QVC are shopping-by-phone services. National Jewish Television (NJT) (Sundays 1-4 P.M. on Ch. 29) is a religious and family-entertainment channel. New York 1 News is a 24-hour, all-news cable service for New York City only. Randolph Television offers entertainment and lifestyle programming for adults aged 45+. Public Access programming is available 24 hours daily on Channels 16 and 17. The Travel Channel provides information on business and leisure travel. Video Interfaith Satellite Network is a religious and family-entertainment channel. The Weather Channel reports on national & local weather. Channels 26 and 35 are available for Commercial Use programming.

Symbols for leasing-required channels: (CO) Closed-captioned (CC) Open-captioned (SL) Sign language

	SATURDAY December 12	SUNDAY December 13	MONDAY December 14	TUESDAY December 15	WEDNESDAY December 16	THURSDAY December 17	FRIDAY December 18
(50)	**SLEEPWALKERS** 9AM, 11AM, 1PM, 3PM, 5PM, 7PM, 9PM, 11PM, 1AM, 3AM			**ENCINO MAN** 9AM, 11AM, 1PM, 3PM, 5PM, 7PM, 9PM, 11PM, 1AM, 3AM			
(40)	**FAR AND AWAY** 7:30AM, 10AM, 12:30PM, 3PM, 5:30PM, 8PM, 10:30PM, 1AM						
(62)	**THE CUTTING EDGE** 9AM, 11AM, 1PM, 3PM, 5PM, 7PM, 9PM, 11PM, 1AM, 3AM			**MY COUSIN VINNY** 8:30AM, 11AM, 1:30PM, 4PM 6:30PM, 9PM, 11:30PM, 2AM			
(60)	Playboy at Night Adult programming nightly (8PM-6AM). See nightly program grids for details.						
(63)	Spice Adult movies (7:30AM-3AM). See channel 40 and nightly program grids.						
	Cutting Edge 6a, 1p, 5p, 3a Encino Man 8a Far and Away 10:30a Sleep-walkers 3p, 7p, 1a Boxing 9p	Sleep-walkers 6a, 1p Far and Away 8a, 5p One Flew Over the Cuckoo's Nest 10:30a, 8p, 12:30a Encino Man 3p, 10:30p, 3a	Cutting Edge 11a City of Joy 1p, 8p, 12:30a Encino Man 3:30p Far and Away 5:30p Sleep-walkers 10:30p, 3a	City of Joy 10:30a, 5:30p, 10p, 2:30a Encino Man 1p, 8p, 12:30a Far and Away 3p	Far and Away 10:30a City of Joy 1p, 8p, 12:30a One Flew Over... 3:30p Sleep-walkers 6p Cutting Edge 10:30p, 3a	City of Joy 10:30a One Flew Over... 1p Far and Away 3:30p Cutting Edge 6p Sleep-walkers 8p, 12m, 4a St. Tropez Sexe 10p, 2a	Encino Man 10a, 12n, 2p, 4p, 6p, 8p, 10p, 12m, 2a, 4a

PARENTAL CONTROL DEVICE

Your addressable channel selector is equipped with a device that allows you to block out any program you do not wish your children to watch. Information is available in your customer handbook. If you wish to lock out your account from our automated order system, please call 533-4722.

HOW TO ORDER

To order automatically: within 1 hour before the start of the movie call the toll-free number that corresponds to the appropriate channel. Listen for a message confirming your order.

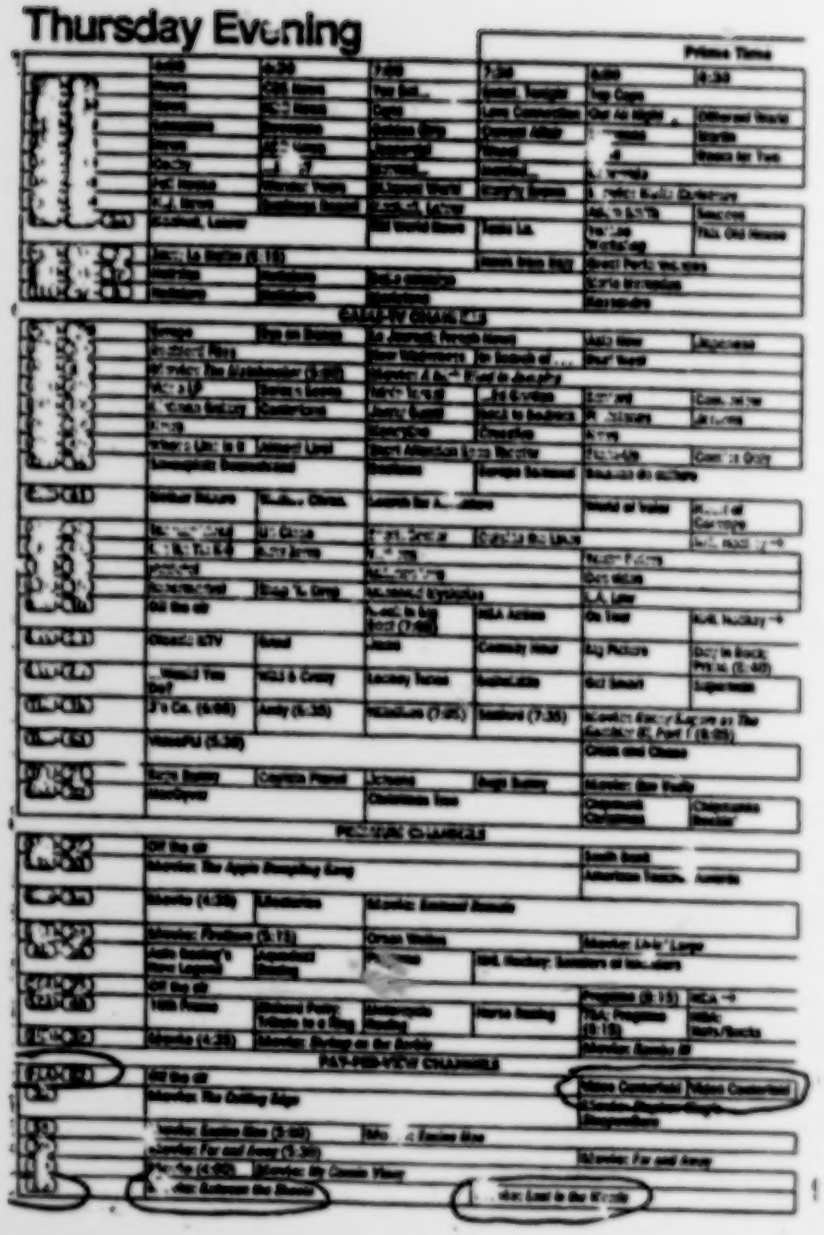
Channel 38: 1-800-379-3838 Channel 58: 1-800-379-5858
Channel 59: 1-800-379-5959 Channel 60: 1-800-379-6060
Channel 62: 1-800-379-6262 Channel 63: 1-800-379-6363

Be sure to call from your home phone. These numbers are for ordering only, not for information. Channels 58, 59, 60, 62 and 63 are only available to residential customers in rebuilt areas.

All hit movies $3.95. All adult movies $4.95. Playboy at Night $4.95 per night (Call between 7PM-3AM). Events are individually priced. Adult movies edited for PPV.

Available to residential customers using an addressable channel selector. Calls to the 800 number will result in an automatic charge to your account. Programming and prices subject to change. MCTV is not responsible for orders not accepted due to technical difficulties (including VCR tapings) or discrepancies in customers' accounts. MCTV is available from E. 86th St. and W. 79th St. south to Battery Park, including Roosevelt Island.

Thursday Evening



Note: Channels 16 & 17 are Public Access - they are not listed in this guide

FCC Caption Omitted

PETITION FOR RECONSIDERATION OF THE NYNEX TELEPHONE COMPANIES

New York Telephone Company and New England Telephone and Telegraph Company (the "NYNEX Telephone Companies" or "NTCs") respectfully ask the Commission to reconsider certain aspects of its First Report And Order released February 3, 1992.[1] In particular, the NTCs are concerned that, by giving cable operators "wide discretion" in banning programming they deem indecent, and by allowing cable operators to ban some but not all indecent programming, the Commission has invited Cable operators to unreasonably deny access to leased channel capacity, and to discriminate among potential customers based on factors other than the indecency of their programming. In addition, by giving aggrieved customers access only to the courts for remedy if access to leased channels is unreasonably denied, the Commission abdicates its role under the Cable Act to provide expedited procedures for insuring reasonable terms and conditions for leased access channels.

I. DISCUSSION

The 1992 Cable Act permits Cable operators:

> to enforce a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs

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[1] In the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, Indecent Programming and Other Types of Materials on Cable Access Channels, MM Docket No. 92-258, First Report and Order, February 3, 1993,

> in a patently offensive manner as measured by contemporary city standards.[2]

In its First Report and Order, the Commission stated that this provision gives cable operators "wide discretion" in classifying programming as indecent, and in enforcing a policy of prohibiting indecent programming.[3] The Commission stated that cable operators may adopt "any measures" appropriate for implementation of such a policy, and that cable operators "have the discretion to prohibit some, but not necessarily all, indecent programming."[4] The Commission concluded that "the courts, rather than this agency, are the appropriate forums for resolution of any disputes concerning whether cable operators have properly denied access pursuant to section 10(a)."[5]

These actions conflict with the Commission's obligations under other sections of the 1992 Cable Act. In particular, Section 9 of the Cable Act requires the Commission to make rules establishing reasonable terms and conditions for commercial use of leased channel capacity, and to establish procedures for the expedited resolution of disputes.[6] Section 11 requires the Commission to ensure that no cable operator can unfairly impede the flow of video programming from the video programmer to the consumer.[7] In Comments on the implementation of Section 9, the NYNEX Telephone Companies urged the Commission to require cable operators to offer channel capacity to unaffiliated entities on nondiscriminatory prices, terms and conditions, and to require that

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2 1992 Cable Act § 10.

3 First Report and Order ¶ 29.

4 *Id.* ¶ 31.

5 *Id.*

6 1992 Cable Act § 9(b).

7 1992 Cable Act § 11(c).

a cable operator may not refuse a reasonable request for channel capacity.[8]

By giving cable operators "wide discretion" in determining what they believe is indecent and in enforcing their policies, unchecked by any Commission supervision, and by explicitly allowing cable operators to discriminate among providers of "indecent" programming, the Commission positively invites cable operators to unreasonably deny access to their channel capacity. Thus, cable operators have a means to block programming from reaching subscribers based on factors unrelated to indecent programming. For example, the Commission's language allowing discrimination would appear to allow cable operators to ban indecent programming provided by a competitor, while accepting the same programming provided by an affiliated programmer or another noncompeting entity. And, by giving customers unreasonably denied access under the guise of "indecency" recourse only to the courts, the Commission is perpetuating the problems of difficulty and delay in obtaining access to leased channel capacity that Congress sought to prevent in enacting Section 9.[9]

The Commission should remedy these aspects of the First Report and Order by ruling that the cable operator may not discriminate among providers of like programming. Further, the Commission should emphasize the Cable Act's requirement that the cable operator may not prohibit programming unless the cable operator "reasonably" believes it is indecent *because* it contains the elements listed in Section 10. Finally, the Commission should allow customers unreasonably denied access to leased channels redress under the expedited procedures established under Section 9, rather than requiring them to go to court.

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8 Comments of the NYNEX Telephone Companies, MM Docket No. 92-266, January 27, 1993, pp. 18-19.

9 *See* House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong. 2d Sess. (1992) ("House Report") pp. 39-40.

II. CONCLUSION

For the reasons stated herein, the NYNEX Telephone Companies respectfully ask the Commission to reconsider the First Report and Order, and to conform it with sections of the Cable Act mandating reasonable and nondiscriminatory access to leased channels, and expedited procedures for resolving disputes.

Respectfully submitted,

New York Telephone Company
and
New England Telephone and
Telegraph Company

By: /s/
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914/644-2764

Their Attorneys

Dated: March 15, 1993

FCC Caption Omitted

OPPOSITION OF
TIME WARNER ENTERTAINMENT COMPANY, L.P.
TO THE PETITION FOR RECONSIDERATION
OF THE NYNEX TELEPHONE COMPANIES

Time Warner Entertainment Company, L.P. ("TWE") opposes the Petition for Reconsideration filed by the NYNEX Telephone Companies ("NYNEX"). NYNEX offers nothing to explain its interest in this proceeding. Rather, it gratuitously suggests that the Commission ignore the language of § 10 of the Cable Television Consumer Protection and Competition Act of 1992, and, based on NYNEX's view of the objectives of other parts of the Act, suggests that the Commission read into § 10(a) an unjustifiable limitation on the cable operator's discretion in dealing with indecent programming on leased access (commercial use) channels.

The Commission correctly determined from the language of § 10, as well as the statements by the Section's sponsor, that § 10(a) was envisioned as giving cable operators "wide discretion" in formulating and implementing a policy prohibiting indecent programming. As the Section's author indicated, § 10(a) essentially returns to the cable operator a small part of its editorial discretion that is otherwise restricted by § 612(c)(2) of the 1984 Cable Act (47 U.S.C. § 532(c)(2)). With respect to indecent programming, the cable operator is acting an a "private party". (138 Cong. Rec. § 646 (Remarks of Sen. Helms, daily ed. Jan. 30, 1991; Report and Order, MM Docket 92-258, at ¶ 30 n.25)) As such, its editorial decisions should not be restricted unless a programmer can demonstrate that the cable operator has denied it access unreasonably under § 612(d) of the 1984 Cable Act.

NYNEX offers no factual basis for its argument that the Commission should assume cable operators will misuse § 10(a). Moreover, its one example of possible misuse does not support its position. NYNEX posits that the Commission's interpretation of

§ 10(a) would permit a cable operator to refuse indecent programming from a competitor while accepting "the same programming provided by an affiliated programmer or another noncompeting entity". (NYNEX Petition at 4)

First, channel capacity used by programmers affiliated with the cable operator is not considered leased access capacity. Therefore, on leased access channels there can be no discrimination between affiliated programmers and other programmers.

Second, in any event, It is difficult to envision how one could determine that different indecent programs are "the same". Within the category of indecent programming there are infinite gradations of indecency ranging from the relatively tame to those that almost cross the line into obscenity. Therefore, cable operators should be permitted to discriminate among various indecent programs unless such discrimination can be shown to be inconsistent with the statutory goals. This is fully consistent with the approach under § 612 of the 1984 Cable Act. Under § 612 price discrimination is acceptable among leased access users, and indeed encouraged by Congress. (H.R. Rep. No. 934, 98th Cong., 2d Sess. 51, *reprinted in* 1984 U.S.C.C.A.N. 4688).[1]

Third, with respect to discriminating in favor of "noncompeting entit[ies]", NYNEX does not explain what type of entities would be "competing" or "noncompeting", or why an operator would want to take the latter's programming in preference to the former's.

Finally, the Commission correctly noted that Congress did not appear to envision a role for the FCC under § 10(a), unlike § 10(b) where the statute specifically directs the promulgation of rules. Where the Commission has instituted regulations it often makes sense for it to oversee compliance. Where it has not, the converse is true. Therefore, it is perfectly consistent for the Commission to leave disputes arising under § 10(a) to be resolved in a court action under § 612(d).

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[1] Cable operators also exercise some level of discretion in allocating leased access time to programmers when demand outstrips supply.

Conclusion

TWE respectfully suggests that the Commission deny the NYNEX Petition for Reconsideration.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.

/s/
Stuart W. Gold

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(212) 474-1000

Its Attorneys

April 7, 1993

FCC Caption Omitted

REPLY OF THE NYNEX TELEPHONE COMPANIES TO COMMENTS OPPOSING THEIR PETITION FOR RECONSIDERATION

New England Telephone and Telegraph and New York Telephone Company (the "NYNEX Telephone Companies" or "NTCs") filed their Petition for Reconsideration in pursuit of one purpose, that the Commission adhere to the goals of competition and protection set forth by Congress in the 1992 Cable Act.[1] To this end the NYNEX Telephone Companies have urged the Commission to adopt carefully tailored rules to assure that cable operators do not use the discretion granted them under Section 10(a) as a means to unreasonably deny access to leased channels to competitors in the guise of prohibiting indecent programming, and to assure that aggrieved customers have meaningful relief in the form of recourse to the Commission through expedited procedures established elsewhere in this rulemaking.

I. DISCUSSION

Only two parties have opposed the NYNEX Telephone Companies' Petition, Time Warner Entertainment Company, L.P. ("Time Warner") and the National Cable Television Association ("NCTA"). Each party claims that the NTCs seek to unjustifiably limit cable operators' discretion in dealing with indecent programming on leased access channels. Such is not the case. The NTCs are simply asking the Commission to adopt measures which

[1] Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act") Pub. L. No. 102-385.

will assure that the discretion granted to the cable operators is not abused.[2]

Time Warner and NCTA each allege that the type of abuse that motivated the NTCs to file their Petition cannot occur. This is based on the strained argument that a cable operator cannot favor an affiliated programmer over a nonaffiliated programmer because an affiliated programmer is not considered a leased access channel customer. "Therefore, on *leased access channels* there can be no discrimination between affiliated programmers and other programmers."[3]

This argument merely serves to highlight the NTCs' concerns. The type of discrimination to which the NTCs refer would take place across channel capacity, and is not limited to a cable operator's activities on leased access channels. A cable operator may, for example, decide to allow an affiliated programmer to run a particular program or class of programs over its own channels, while denying an unaffiliated programmer the ability to run the same or similar programs over a leased access channel. If cable operators indeed read the Act as isolating the potential for arbitrary

[2] Time Warner (at 1) and NCTA (at 1) question the NTCs' interest in this proceeding. The cable and telecommunications industries are converging. It is certainly possible that the NTCs will be leasees of channel capacity in the future. The NTCs filed extensive comments and reply comments in the related Cable Rate Regulation Docket (MM 92-266). As set forth in those comments, the NTCs are concerned that the Cable companies are moving aggressively into the telecommunication market without constraints, and indications are that they may use their monopoly rents from cable television to subsidize the telephone ventures. NYNEX Comments at 3. By their comments the NTCs have consistently argued that reasonable and nondiscriminatory access to leased access channels is essential to creating a competitive market. Indeed by their Reply Comments, the NTCs raised their concerns that the wide discretion being granted in this proceeding could lead to the unreasonable denial of leased access channel capacity. Thus the NTCs have a clear and established interest in this proceeding.

[3] Time Warner at 3; see also NCTA at 6.

discrimination to leased accessed channels, they will feel free under cover of the fig leaf provided by Section 10(a) to favor their affiliate programmers over non-affiliates who seek to use leased access to provide competitive offerings.

Congress, in adopting the Act, recognized the potential for discrimination across channels. As noted in the Senate Report to the 1992 Cable Act,

> For irrefutable evidence of the failure of the leased access provision, one need look no further than the marketplace. Despite widespread instances of dropping of local broadcast stations and refusals to carry competitive program services, there is no evidence that excluded programmers have been successful in gaining access through Section 612 ....
>
> The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer.[4]

This excerpt from the Senate Report also refutes the claim that the NTCs raised only a spectre of harm,[5] or that its concerns lack a factual basis.[6]

Both Time Warner[7] and NCTA[8] argue that Section 10(a) restores editorial discretion otherwise restricted by Section 612(c)(2) of the 1984 Cable Act, and that as such the cable operator's discretion regarding indecent programming should be given broad berth. However, because it is the exception to the general rule, the

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4 Senate Report 109-92 at p. 30.

5 NCTA at 2.

6 Time Warner at 2.

7 Time Warner at 2.

8 NCTA at 4.

Commission should place at least some parameters around this discretion.

The opposing parties state that the NTCs' request that the FCC reconsider its rule to make certain that the cable operator may not discriminate among providers of like programming will be difficult to administer and should, therefore, be rejected by the Commission. Inconvenience should not in itself excuse the cable operators — or the Commission — from adopting measures to limit arbitrary discrimination that would impede the fundamental purpose of the Act, that is to promote competition. The Commission has required common carriers to administer equally unwieldy standards under even more difficult circumstances.[9]

Administrative safeguards that allow the cable operators editorial discretion while protecting the leased access programmer can, and should be crafted. For example, similar to the proposal offered by Denver Access[10] in their comments in this proceeding, the cable operator could be required to give advance written notice of its determination, stating with precision what provision of the standard set forth in Section 10(a) led to the conclusion that the program was indecent. Such a procedure would not, in any way, limit the cable operator's discretion, only make the operator

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9 The Commission need only look to the same "Indecency" issue as it has developed over recent years in the common carrier arena. Another example is the Commission's recent order on telecommunications relay service that prohibits communications assistants "from intentionally altering a relayed conversation and, to the extent that it is not inconsistent with federal, state or local law regarding use of telephone company facilities for illegal purposes, must relay all conversations verbatim.... 47 CFR § 64.604(a)(2). Thus the communications assistant is, in essence, required to make an on the spot determination that the telephone company's facilities are not being used for illegal purposes. Clearly this is a much greater burden than requiring cable operators to justify what Section 10(a) elements a program allegedly violates.

10 *See* Comments of Denver Area Educational Telecommunications Consortium, Inc, ("Denver Access"), MM Docket No. 92-258, at 10.

accountable for its decision, and thus help assure that the decision is based on the elements contained in section 10(a).

The NTCs have also petitioned the Commission to reconsider its decision to give aggrieved customers access only to the courts if access to leased channels is unreasonably denied. Denver Access' comments, based on its experience, demonstrated that seeking recourse through the courts can be costly and time consuming, nearly rendering relief meaningless.[11]

As the Commission itself recently noted

> Given the lack of focus on leased channel issues in this proceeding and the absence of Commission experience in administering rules of this type... [a]n expedited complaint process will be used to address complaints regarding leased channel rate and access issues.[12]

Clearly, the absence of experience with the open discretion being proposed for cable operators regarding indecent programming over leased access channels, coupled with the potential to abuse the discretion for anticompetitive purposes, should lead the Commission to extend its expedited complaint process to claims brought under Section 10(a).

II. CONCLUSION

For the reasons set forth herein, the NYNEX Telephone Companies again respectfully ask the Commission to reconsider its First Report and Order, and to conform it with the sections of the

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[11] *Id.* at 3-5.

[12] *See* FCC News Release re: MM Docket No. 92-266 "Summary of Rate Regulation Report and Order" para. 62 (April 1, 1993).

Cable Act mandating reasonable and nondiscriminatory access to leased channels and expedited procedures for resolving disputes.

Respectfully submitted,

New York Telephone Company
and
New England Telephone and
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By: /s/
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Dated: May 6, 1993

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. and AMERICAN CIVIL LIBERTIES UNION,
Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Respondents.

No. 93-1171

DECLARATION OF JOHN B. SCHWARTZ

John B. Schwartz, under penalty of perjury, declares:

1. I am the President of petitioner Denver Area Educational Telecommunications Consortium, Inc. ("The 90's Channel" or "DAETC"). I submit this declaration on personal knowledge to demonstrate the irreparable harm that the Commission's new cable access indecency rules will cause The 90's Channel, in support of petitioners' motion for a stay.

2. DAETC, a Colorado non-profit corporation, is a cable programmer operating a leased access cable service known as The 90's Channel, currently reaching approximately 500,000 basic cable subscribers to cable systems owned by Tele-Communications, Inc. ("TCI") in Arizona, California, Connecticut, Colorado, Maryland, and Michigan.

3. The 90's Channel carries a wide variety of material, much of it both controversial and otherwise unavailable to viewers. It transmits documentaries and magazine programs on political, environmental, labor, and social topics, and many of its programs express opinions, which are generally progressive.

4. The 90's Channel does not carry pornography, and has never carried a full-length program that dealt with sexuality *per se*.

Most of its programming has no sexual content. Nonetheless, a small but important portion of its programming has dealt with such topics as arts censorship, gay rights, feminism, prostitution, and AIDS, and its coverage of those matters has on occasion inextricably included discussion of sexuality and the description or depiction of sexual activity.

5. Among past programs that The 90's Channel has presented that I do not believe to be indecent, but which we would probably have self-censored had the Commission's new rules been in effect because of our concern (described at greater length in paragraphs 7-10 below) for the legal consequences and economic costs of defending against them, are:

- "Self-help", which shows a women's health organization in Austin, Texas attempting to demystify gynecology, teaching women how to perform their own pelvic examinations. The intimidating nature of gynecological procedures are described, and an internal examination is shown.
- "DiAna's Hair Ego" is a video about a black hairdresser in South Carolina who provides her customers not only with grooming and neighborhood gossip but also with AIDS education, condoms, and safe sex advice.
- "Mapplethorpe Exhibit," exploring the controversy over the Robert Mapplethorpe exhibit at a Boston art museum. Interviews with attendees are interspersed with images of many of the photos, including some of his most dramatic nudes. The view of one man that $30,000 in government funding was spent "to put picture frames around these hideously obscene pictures" is countered by a woman's observation that nudes of women are common but Mapplethorpe is one of the few photographers who celebrates the beauty of the male body. The Museum's director discusses the public debate sparked by the exhibit about issues of racism and homophobia.
- "Fertility Festival" is a *National Geographic*-type anthropological piece presenting images and sounds from the remarkable ancient annual fertility festival in Iuyama, Japan in

which local residents march through city streets with totems shaped like giant penises.

6. Under the new statutory and regulatory scheme as I understand it,

(a) each cable operator is authorized to prohibit leased access programming "which, it reasonably believes, describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards," and literally to censor programming identified by programmers as indecent, despite the injunction of 47 U.S.C. § 532(c) that "[a] cable operator shall not exercise any editorial control over any video programming provided" over leased access cable channels;

(b) program providers must identify as "indecent" every leased access program that contains any description or depiction of sexual activity or organs that could be considered "patently offensive" for the average cable subscriber nationwide, and cable operators may further require programmers to certify *all* leased access programming as indecent or not;

(c) any program identified as indecent by the program provider not prohibited outright must be placed on a blocked channel, and viewers will be able to access such programming for themselves or their children only if they send a written request for unblocking, which the cable operator may take up to thirty days to accomplish. Because this will be widely viewed as a "porno list," it will substantially impede access (which may well have been the intent of its sponsors). Any program identified as indecent by cable operators (if they exercise the prescreening power afforded by the Commission and do not prohibit "indecent" programs outright) may be blocked or channelled to "time periods of their choosing"; and

(d) operators have been stripped of their longstanding immunity from prosecution for programming on leased access channels "that involves obscene material," thereby strongly inducing them to censor materials with sexual content.

7. Serious and irremediable harm threatens The 90's Channel (and other access programmers and viewers) if the rules promulgated by the Federal Communications Commission that are the subject of this petition go into effect. As detailed below, the 90's Channel will have to use an extraordinarily encompassing definition of what is or is not indecent because of the drastic consequences that may befall The 90's Channel under the rules

- if it fails to identify as "indecent" any programming that TCI "reasonably believes" *or* that the Commission finds describes or depicts sexual activities "in a patently offensive manner" for the "average subscriber to cable television" in the nation (*see* First Report and Order (hereafter "First Report) ¶ 37), or
- if it certifies any program as not indecent and TCI disagrees with its judgment (assuming that TCI, acting pursuant to the Commission's authorization, requires The 90's Channel to certify to the "indecency" or not of *all* of its programming).

8. The 90's Channel will have to impose strict self-censorship because the consequences of a single error, or a single case of error as perceived by the cable operator, are so great. TCI, lessor to The 90's Channel, expressed the following views in its comments on the FCC in the proceeding concerning implementation of Section 10 of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Act"):[1]

> If a leased access programmer that has a contract for carriage has certified that its program is not indecent, and breaches that commitment, then the cable operator should have the full range of remedies available, including voiding the contract and discontinuing carriage. Here, again, no new FCC regulations regarding disputes are necessary

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[1] MM Docket No. 92-256.

> because both parties have the normal ability to pursue their rights under the contract.[2]

In its First Report, the FCC essentially upheld TCI's position, referring to "the wide discretion Congress afforded cable operators under this section," and declining to take any role regarding denial of access under Section 10(a) of the Act.[3]

9. Thus, if TCI (or any cable operator leasing channel capacity) believes — rightly or wrongly — that a breach of certification has occurred through submission of a single putatively indecent program, it can apparently remove *an entire program service permanently*, subject (perhaps) to later judicial action ordering restoration. The prospect of the indefinite, possibly permanent, loss of our entire channel means that in practice we will have to withhold any program which the cable operator might perceive to be indecent.[4]

10. Significantly, the First Report provides for where there are allegations of "under-identification" of indecency, but not where there are allegations of its "over-identification" by operators. The Commission advised that the rules "do not envision disputes arising from the content of programs on the leased access channel *except where a program, not identified by a program provider as indecent, is carried on a non-blocked leased channel, and is alleged to be indecent*." First Report ¶ 75.

11. The basis for The 90's Channel's ability to present its alternative form of programming has been the statutory prohibition of operator censorship and involvement in any way in the content of our programming. The new rules alter that regime by granting operators who are hostile to leased access channels, as I believe TCI to be, the ability to censor any of our programming

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[2] Comments of TCI at 18-19.

[3] First Report ¶ 31.

[4] In addition to private penalties imposed by cable operators, we are also subject to the imposition of financial penalties by the Commission (see First Report at ¶ 77).

with sexual content outright, knowing that TCI is protected by the "reasonable belief of indecency" standard and the expense of any legal challenge to that censorship or, worse, to terminate our leased access contract because of a certification or identification with which they purport to disagree. Leased access is the only effective outlet DAETC has to reach the hundreds of thousands of viewers that it now reaches. For some time TCI has been attempting to remove The 90's Channel from its systems, and the legislative history shows the general hostility of operators to access programmers. *See generally* DAETC Comments at 3-5, 7-10.

12. The Commission's vague and opaque definition of indecency (or TCI's private definition, from which no appeal may be available) are completely inadequate for programmers like myself to determine whether particular programs are "indecent" within the meaning of the Commission's rules and subject to censorship. I have no idea what "contemporary community standards *for the cable medium*" are, or how to find out. Based on the extent of R- and X-rated material on cable systems throughout the nation (*e.g.* on Time-Warner's "REAL SEX" or THE PLAYBOY CHANNEL or on pay-cable adult services, one could conclude that under those standards material would have to be what is referred to as "hard core pornography" to be "indecent"; but I doubt that Section 10's sponsors had that standard in mind when they persuaded the Senate in less than a day, in an election year, to support their hastily drafted amendment, or that the Commission so believes, Since the Commission deliberately referred to standards "*for the cable medium*," its decisions and rules concerning indecency in the broadcast context do not provide reliable guidance; indeed, the Commission's broadcast indecency policy has been shifting so much in recent years as to give no guidance even in the broadcast context. Moreover, the rules subject our programming in the first instance not to the Commission's view of "indecency" but to TCI's view, so long as some court (apparently a state court, in a breach of contract action) later finds that view "reasonable."

13. Program guides for the systems on which we operate do not typically give viewers more than 30 days advance notice of programming. Even if we assume that operators will not

prohibit "indecent" programming outright but will only block it pursuant to the Commission's rules, the new rules would still effectively preclude access to programs even by viewers who, having seen notice of a program on AIDS education or sex education, seek to obtain it. A subscriber request to unblock need not be honored until the 30th day after it is received, which as a practical matter censors the program even for the viewer who expressly seeks access to the program. First Report ¶ 67. Thus, for the asserted purpose of protecting young people (who could be "protected" if necessary by parentally-controlled lockboxes), the new rules effectively deprive not only children but also adults of much constitutionally protected programming.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 8, 1993.

/s/

JOHN B. SCHWARTZ

No. 95-124

(4)

Supreme Court, U.S.
FILED
DEC 26 1995
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

Sections 10(a) and 10(b) of the 1992 Cable Act establish a comprehensive scheme for censorship of "indecent" programming on leased access channels. Congress authorized cable operators to prohibit programming that they "reasonably believe" to be indecent and, in the alternative, required such protected speech to be placed on segregated channels that must be blocked until the subscriber requests access in writing and for up to thirty days thereafter. Section 10(c) authorized cable operators to prohibit programming on public, educational, and governmental access channels that is "sexually explicit" or "solicits or promotes unlawful conduct."

1. Is section 10's explicitly content- and speaker-based censorship scheme subject to First Amendment scrutiny?

2. Is section 10 unconstitutional because it authorizes and requires censorship under vague standards and lacks essential procedural safeguards?

3. Is section 10's content- and speaker-based censorship scheme — which regulates "indecent" speech on only access channels and is not the least restrictive means of accomplishing a compelling governmental interest — unconstitutional under the First Amendment?

LIST OF PARTIES

The judgment here reviewed was rendered in a proceeding in the United States Court of Appeals for the District of Columbia Circuit addressing four petitions for review of orders of the Federal Communications Commission.

In addition to those listed on the cover, respondents include Alliance for Community Media, Alliance for Communications Democracy, People For the American Way, New York Citizens Committee for Responsible Media, Media Access New York, Brooklyn Producers' Group, and David Channon. The foregoing respondents are petitioners in no. 95-227, which has been consolidated with the present action, and their interests are aligned with those of petitioners here.

Respondents also include National Cable Television Association, Inc., which was an intervenor in all four proceedings before the court of appeals.

RULE 29.6 NOTATION

Petitioners have no parent companies or subsidiaries.

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No. 95-124

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

BRIEF FOR PETITIONERS

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 56 F.3d 105 and reprinted in the appendix to the petition for writ of certiorari ("Pet. __a") at 2a. The en banc *per curiam* order vacating the panel decision is reported at 15 F.3d 186 and reprinted at Pet. 89a. The panel decision is reported at 10 F.3d 812 and reprinted at Pet. 90a.

JURISDICTION

The court of appeals issued its decision on June 6, 1995 and stayed issuance of the mandate on July 10, 1995. Pet. 1a. The Court docketed the timely petition for writ of certiorari on July 21, 1995 and granted the petition on November 13, 1995. The Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2350(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment to the Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom

of speech, or of the press." The Fifth Amendment to the Constitution to the United States provides, in pertinent part, that "No person shall . . . be deprived of life, liberty, or property, without due process of law."

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j), and 558) ("section 10" or "§ 10") is reproduced at Pet. 126a. *See also* Statutory Addendum below ("Stat. __a") (relevant provisions governing leased access and PEG access channels).

The implementing regulations of the Federal Communications Commission (the "Commission") are the First Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 998 (1993) (codified at 47 C.F.R. § 76.701) ("First Report"), reproduced at Pet. 128a, and the Second Report and Order in the Matter of Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 8 FCC Rcd 2638 (1993) (codified at 47 C.F.R. § 76.702) ("Second Report"), reproduced at Pet. 178a.

STATEMENT OF THE CASE

1. **Local Regulation and the 1984 Cable Act.** Cable access channels were first created in the 1960s, as cable operators received franchises from local authorities. Local governments provided "use of public rights-of-way and easements" essential to the cable system's "physical infrastructure," *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2452 (1994), and, in turn, generally required cable operators to act as conduits and set aside some portion of their channel capacity for the public, thereby providing a "direct right of access to the video media" through access channels, the content of which cable operators were generally prohibited from controlling, DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.04[1], at 6-31 (1995); *cf. Turner*, 114 S. Ct. at 2465 (cable operators are also conduits for broadcast signals).

In 1972, the Commission promulgated mandatory access rules, requiring the largest cable operators to offer, by 1977, access to the

public on a first-come, nondiscriminatory basis, with operators having no control over content. 36 F.C.C.2d 143 (1972). In 1976, the Commission revised and reissued its mandatory access rules, applying them to more cable systems and extending the compliance date for most systems to 1986. 59 F.C.C.2d 294 (1976). On review of these rules, this Court held them statutorily unauthorized. *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).[1]

Although the Commission lacked authority to mandate cable access channels, local franchising authorities were free to do so, and, in the wake of *Midwest Video*, almost all franchise agreements continued to provide for access by community groups over public access channels, where operators functioned simply as conduits, and prohibited operator control of content. *See* H.R. REP. NO. 934, 98th Cong., 2d Sess. 30 (1984).

Then, in 1984, to "assure that cable communications provide . . . the widest possible diversity of information sources and services to the public," Congress passed the Cable Communication

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[1] Despite their general prohibition of editorial control by cable operators over access channels, the Commission's 1972 access rules required cable operators to "establish" rules prohibiting transmission of obscene or indecent matter, but delayed their compliance date until 1977. 47 C.F.R. § 76.256(d)(1)-(3). In 1976, the Commission revised these provisions to clarify that they were mandatory, but again delayed compliance. 59 F.C.C.2d 984, 986 (1976). These provisions as revised were challenged as an unconstitutional imposition of censorship obligations on cable operators, and the Court of Appeals for the District of Columbia Circuit stayed their effect. *American Civil Liberties Union v. FCC*, No. 76-1695 (D.C. Cir. Aug. 26, 1977) (referenced in *Midwest Video*, 571 F.2d 1025, 1034 n.19 (8th Cir. 1978)). In its *Midwest Video* decision, the Eighth Circuit found that "the Commission appears to have created a corps of involuntary government surrogates, but without providing the procedural safeguards respecting 'prior restraint' required of the government," and flagged several other constitutional concerns. 571 F.2d at 1056, 1057. This Court noted the District of Columbia Circuit's stay and the Eighth Circuit's disapproval of the indecency provisions, but, finding the entire regulatory scheme unauthorized by Congress, did not itself reach those issues. 440 U.S. at 693 n.4, 695-96.

Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2780. 47 U.S.C. § 521. This Act required cable operators to set aside channels for leased access programming that the operators were forbidden to censor. *Id.* § 532(b), (c)(2). It also prohibited them from censoring programming on the public, educational, and governmental ("PEG") access channels required under cable franchise agreements. *Id.* § 531(e). Because cable operators were barred from exercising editorial control over these access channels, Congress explicitly shielded cable operators from liability for access programming. *Id.* § 558.[2] In another provision of the Act, Congress required operators to provide "lockboxes" that enable a subscriber to block any cable channel during selected periods, *id.* § 544(d)(2)[3]; this provision remains in effect.

2. **The 1992 Cable Act**. In 1992, Congress again focused on the cable industry — this time primarily to promote diversity through temporary rate re-regulation, address customer service practices, and implement "must-carry" broadcast rules — and enacted the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460. On the last legislative day before the Senate approved its bill, Senator Helms offered two floor amendments and then-Senator Fowler offered a third that collectively became § 10, entitled "Children's Protection from Indecent Programming on Leased Access Channels." Senator Helms plainly stated the purpose of § 10's liability provision: to "put an end to the kind of things going on" on access channels. 138 CONG. REC. S652 (daily ed. Jan. 30, 1992). No other provision in the lengthy Senate or House bills even remotely treated "indecency" or protection of children. Section 10 was never sent to a committee and was never the subject of any congressional hearings or findings.

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[2] Such immunity would be required in any event where transmitters of speech lack power to control its content. *Farmers Educ. & Coop. Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

[3] *See* Lockbox Materials, JA 95-100, 126-30, 147-51 (demonstrating the supervising subscriber's ease of voluntarily blocking any cable channel).

Section 10 established a censorship scheme with four interlocking parts. Section 10(a) authorized cable operators to ban from leased access channels what they "reasonably believe[] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pet. 126a. Cable operators were given, and have, no other "editorial discretion" to regulate the content of leased access programming. Pet. 126a; Stat. 2a-4a.

Section 10(b), the stated purpose of which is "to limit the access of children to indecent programming," required the Commission to prescribe rules requiring cable operators that have not "voluntarily prohibited" programming under § 10(a) to segregate all "indecent" leased access programming on channels that must remain blocked until a subscriber requests access in writing; Congress mandated no time period within which such requests must be satisfied. Pet. 126a-27a. Section 10(b) also required the Commission to prescribe rules requiring leased access programmers to identify for cable operators any of their programs that "would be indecent as defined by Commission regulations." Pet. 126a.

Section 10(c) applied to PEG access channels and authorized cable operators to ban "any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Pet. 127a. However, if a cable operator does not ban particular "indecent" PEG programming, it may cablecast that programming without blocking, just as it may cablecast "indecent" programming on its commercial channels without blocking (where it functions as publisher rather than simply as conduit) and must cablecast such broadcast programming without blocking. *See* Pet. 127a.

Section 10(d) eliminates cable operators' statutory immunity from liability for access programming that "involves obscene material." Pet. 127a. Taken together with § 10's other provisions, § 10(d) virtually compels cable operators to censor "indecency."

3. **Comments to the Rule Making.** On November 10, 1992, the Commission issued a notice of proposed rule making to implement § 10 and requested comments. Petitioners Denver Area Educational Telecommunications Consortium, Inc. ("DAETC"),

which is a nonprofit leased access cable programmer, and American Civil Liberties Union ("ACLU"), whose members include leased and PEG access viewers (also collectively "petitioners"), submitted comments to the Commission challenging the constitutionality of § 10 and describing its impact on a wide variety of access programming of serious journalistic or artistic value.

Petitioners noted their concern with § 10's capacious definition of "indecent programming" as "describ[ing] or depict[ing] sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pet. 126a. Because this definition has no substantive content except to subject all programming that contains any mention of human reproduction or sexuality, regardless of its value, to a retrospective assessment of "community standards" of "offensiveness," it encompasses a far wider, but uncertain, range of programming than Senator Helms evidently envisioned from the anecdotal examples he offered on the Senate floor.[4] Comments of DAETC, JA 203-04.[5] Even if one could identify programming that actually contains "indecent" material, § 10(a) exacerbates the overbreadth of that definition by granting cable operators authority to prohibit programs that they "reasonably believe" contain indecent material. Reply Comments of DAETC, JA 330-31; *see* Acton Corp., JA 1-2.

Indeed, much of DAETC's socially useful programming would be swept up in § 10's broad definition of "indecency." DAETC's cable access service, which is known as "The 90's Channel" and is offered in a block of programming reaching approximately 500,000

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[4] Senator Helms referenced programming on leased access that, he alleged, featured people performing oral sex and included ads that "promote incest, beastiality [sic], [and] even rape." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992).

[5] *Accord* Alliance for Community Media, JA 43-45; Boston Community Access and Programming Found., JA 167; Manhattan Neighborhood Network, JA 236; Time Warner Entertainment Co., JA 253-55 (suggesting context and merit elements to the standard); Motion Picture Ass'n of Am., Inc., JA 335-37 (same); *see* Cambridge Community Television, JA 313 (as to § 10(c)).

households, presents in a verité style a wide variety of material. Its programming is often controversial and otherwise unavailable and discusses topics including the Persian Gulf war, environmental contamination, AIDS, racism, US-Cuba relations, art censorship, union organizing, the status of recent immigrants, gay rights, the Palestinian uprising, issues of concern to Native Americans, prostitution, and prison conditions. Comments of DAETC, JA 199-201. An important part of DAETC's programming on many of these topics inextricably deals with sexuality, such as the program segments about an organization that seeks to demystify gynecology and teach women how to perform their own pelvic exams, the controversy surrounding a Robert Mapplethorpe art exhibit, a pro-choice performance artist, and an annual Japanese fertility festival — all of which might well fall within § 10's broad regulatory definition of "indecency" or cable operators' "reasonable beliefs" about "indecency." Program Segments Carried by The 90's Channel Dealing with Sexuality, JA 224-25; *see* Pet. 44a-45a (Wald, J., dissenting).[6]

In their comments to the Commission, cable operators expressed their concern that § 10 offended the First Amendment.[7] Many commented that Congress' existing requirement of lockboxes

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[6] For further examples of the valuable programming at risk, see, *e.g.*, Alliance for Community Media, JA 21-23; Ann Arbor Community Access Television, JA 155; New York Citizens Comm. for Responsible Media, JA 361; Patricia Aufderheide, *Public Access Cable Programming, Controversial Speech, and Free Expression* (Dec. 1992), JA 64, 67; *see also* Schwartz Decl., JA 388-94.

Other access programmers were concerned that the certification and pre-screening requirements placed insurmountable burdens on them because of their limited finances and personnel, resulting in a substantial diminution of invaluable programming. *E.g.*, Ann Arbor Community Access Television, JA 155; Roxie Lee Cole, JA 170-71; Columbus Community Cable Access, JA 172.

[7] Blade Communications, Inc., JA 159; Community Antenna Television Ass'n, JA 175; Cox Cable Communications, JA 196, 197; InterMedia Partners, JA 226; Tele-Communications Inc., JA 247; Viacom Int'l Inc., JA 353-54; *see also* Motion Picture Ass'n of Am., Inc., JA 333-35.

already satisfies the government's asserted interest in protecting children from "indecency," particularly in light of cable's status as an invitee in the home for which the subscriber voluntarily pays a monthly fee.[8] Some commented that, although the bans authorized by §§ 10(a) and 10(c) are in form voluntary, the impact of § 10 in many instances is likely to be a *de facto* ban on the targeted, yet protected, speech.[9]

Local cable authorities complained that the proposed rules would deprive them of their state-law rights to prohibit cable operators from controlling the content of cable access programming, which many of them had exercised even before the Commission attempted to mandate access channels in the 1970s. City of St. Paul, JA 318-26; National Ass'n of Telecommunications Officers & Advisors, JA 345; *see* Continental Cablevision, Inc., JA 181, 186-87 (requesting clarification that agreements prohibiting operator control of access channels are preempted).

4. **The Commission's Reports and Orders.** On February 3, 1993, the Commission released its First Report, which adopted regulations to implement §§ 10(a) and 10(b) relating to leased access channels. Pet. 128a. Despite petitioners' and other comments, the Commission defined "indecent" programming almost identically to the language used in § 10(a), authorized a cable operator to adopt and enforce a policy of banning leased access programming that it "reasonably believes" contains indecency, and, if a cable operator does not voluntarily adopt and enforce such a

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[8] Blade Communications, Inc., JA 160; Community Antenna Television Ass'n, JA 178; Tele-Communications Inc., JA 246, 247; Time Warner Entertainment Co., JA 256; Viacom Int'l Inc., JA 354; *see* Alliance for Community Media, JA 38-39; Boston Community Access & Programming Found., JA 166; Motion Picture Ass'n of Am., JA 334; 'Ōlelo: The Corp. for Community Television, JA 352; New York Citizens Comm. for Responsible Media, JA 364.

[9] Continental Cablevision, Inc., JA 181-82, 183, 187-92; InterMedia Partners, JA 228; *see also* Cambridge Community Television, JA 313; 'Ōlelo: The Corp. for Community Television, JA 351; NYNEX Tel. Cos., JA 377.

policy, required it to block all leased access programming that falls within the Commission's definition of "indecency." 47 C.F.R. § 76.701, Pet. 171a-72a. Cable operators are also allowed to delay for up to thirty days satisfying a subscriber's written request to receive blocked programming. *Id.* § 76.701(c), Pet. 171a.

The First Report's regulations further required leased access programmers to identify whether any of their programming is indecent and to certify at the operator's request whether any or all of their programming is indecent or obscene. If a programmer fails to provide this identification or certification in a timely fashion, the cable operator may cut off access to that programmer altogether. *Id.* § 76.701(f), Pet. 172a. If a cable operator (or a subscriber) disagrees with a programmer's certification, the Commission "will entertain special relief petitions." Pet. 167a-68a.[10] In order to exercise the censorship power delegated to them, cable operators are further authorized to "pre-screen" all leased access programming. Pet. 151a n.39.

The Commission's Second Report adopted regulations to implement § 10(c) relating to PEG access channels. Pet. 178a. The Commission interpreted § 10(c) to authorize cable operators to prohibit obscene material, indecent material (defined as in the First Report, rather than as § 10(c)'s "sexually explicit material"), and material soliciting or promoting unlawful conduct (interpreted by the Commission as "material that is otherwise proscribed by law"). 47 C.F.R. § 76.702, Pet. 197a-98a. To further facilitate censorship of access programming, the regulations provided that a cable operator may require a PEG access programmer "to certify that its programming does not contain any of the materials" subject to § 10(c) prohibition. *Id.*, Pet. 198a. Additionally, the Commission stated that it would not consider disputes from subscribers or PEG programmers complaining of undue censorship. Pet. 194a.[11]

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[10] Under § 10(a), the Commission does not, apparently, intend to hear programmers' or viewers' complaints of undue censorship. Pet. 166a-68a; *see* Time Warner Entertainment Co., JA 380.

[11] The Commission also read a "reasonably believes" standard into

(continued...)

The Commission also determined in each of the reports and orders that § 10 and its implementing regulations preempt contrary state or local law and contrary provisions in cable franchise agreements. Pet. 157 n.44, 183a n.7.

5. **The Proceedings Below.** Petitioners petitioned the Court of Appeals for the District of Columbia Circuit for review pursuant to 28 U.S.C. § 2342(1). These petitions were consolidated with others, and the Commission and the United States (collectively the Commission or the "government") were respondents in each.

After oral argument during which the government conceded that, if §§ 10(a) and 10(c) involved "state action," they would violate the First Amendment, Pet. 104a n.9, a panel of the court unanimously struck down §§ 10(a) and 10(c). As to § 10(b) and its implementing regulations, the panel found such serious constitutional questions due to their apparent underinclusiveness that it remanded them to the Commission for reconsideration. Pet. 112a-25a.

The full court vacated the panel's judgment, reheard the case en banc, and sustained § 10 and the regulations over the dissent in whole or in part of four of the court's eleven judges. Pet. 4a-5a.[12] The majority concluded — in an unprecedented holding — that the court could avoid reaching petitioners' constitutional challenges to a content-based statute regulating protected speech and the implementing regulations because they only authorize, rather than command, private parties to ban the targeted speech and because those private acts cannot be attributed to the government. Pet. 11a-27a. As to § 10(b), which compels blocking in the absence of banning on leased access channels, the majority held, despite the absence of legislative or administrative support, that it is the least restrictive means to serve the "compelling" interest in shielding minors from "indecent" speech, Pet. 32a-36a, and cursorily determined that § 10 is not impermissibly vague, Pet. 42a-43a.

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[11](...continued)
§ 10(c). Pet. 189a.

[12] Former-Chief Judge Mikva sat on the original panel, but retired before the rehearing en banc.

In her dissenting opinion joined in full by Judge Tatel, Judge Wald pointed out that §§ 10(a) and 10(b) must be considered together as part of one scheme regulating leased access programming, which, rather than "restore" editorial control to cable operators, requires them either to ban or block "indecent programming" and, as such, is clearly subject to First Amendment scrutiny. Pet. 46a-53a. Now also joined by Judge Rogers, Judge Wald concluded that §§ 10(a) and 10(b) unconstitutionally cause a deprivation of First Amendment rights because of their undue burden on both speakers and listeners, Pet. 54a-58a, and are not the least restrictive means of achieving the asserted compelling interest because of the ready availability of less restrictive means, such as the existing lockbox requirement, Pet. 66a-71a. Additionally, Judge Wald found that § 10(c), with its governmentally imposed definitions of disfavored speech and its erection of a separate statutory scheme to regulate such speech, clearly constitutes governmental action and is not the least restrictive means of achieving the asserted compelling interest. Pet. 71a-75a.

Chief Judge Edwards dissented in part and found that §§ 10(a) and 10(b), which must be read together, involve government action (while § 10(c) does not) and that they work in tandem to produce an impermissible ban on protected speech. Pet. 77a-81a. Chief Judge Edwards also questioned whether the government's asserted interest in shielding minors from "indecency" was compelling. Pet. 82a-84a. Judge Rogers, concurring in part and dissenting in part, agreed that § 10(b) is unconstitutional, but argued that it is severable from §§ 10(a) and 10(c). Pet. 85a-88a.

SUMMARY OF THE ARGUMENT

Section 10 and its implementing regulations cannot escape constitutional scrutiny because laws regulating speech and discriminating on the basis of content and speaker identity are subject to review regardless of whether every action taken under them is state action. Congress, through 28 U.S.C. §§ 2342-49, directed the courts to "determine the validity" of all Commission regulations, which necessarily requires resolution of constitutional challenges. Moreover, § 10 preempts state laws banning operator censorship of

access channels and establishes the Commission as a joint participant in the censorship scheme. (Point I.)

Section 10 and its implementing regulations are invalid because they authorize operators to ban disfavored speech under impermissibly vague standards and without the procedural safeguards required of all laws that authorize the prohibition of speech based on its content. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), is not to the contrary, because, in an adjudicative (rather than facial) challenge, it narrowly addressed the permissibility of an "indecent language" standard and did so only in the context of channeling. Here, however, private delegates are ordered to segregate and block a completely vague category of "patently offensive" "programming" (not merely "language") if they do not prohibit it outright on a "reasonable belief" that it is "indecent," all without administrative or judicial superintendence. (Point II.)

Finally, § 10 is invalid because it imposes new censorship and other substantial burdens on protected speech due to its content and the identity of its speakers. Moreover, assuming further scrutiny is necessary, § 10's application to far more speech than might be harmful to minors, the underinclusiveness of the blocking requirement (cable operators are free to continue cablecasting identical speech on PEG and commercial channels without blocking), and the availability of less restrictive but equally effective alternatives (such as lockboxes and blocking on request) doom the censorship system that § 10 created for access channels. (Point III.)

ARGUMENT

Cable programmers "engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment" when they create and disseminate "'original programming . . . on a wide variety of topics and in a wide variety of formats.'" *Turner*, 114 S. Ct. at 2456 (citation omitted).

Their speech is no less protected when it touches on sex. As this Court held in *Roth v. United States*, 354 U.S. 476, 487 (1957), "[t]he portrayal of sex, *e.g.*, in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press. Sex, a great and

mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."[13]

Given § 10's extraordinarily sweeping definition of "indecency" and authorization to censor speech upon a "reasonable belief" that that broad definition is met (*see* Point II below), this case must be decided in full recognition that § 10 imperils the presentation of speech of substantial artistic, literary, scientific, medical, educational, and social importance: speech that is protected not only for adults, but for teenagers as well.[14] The measure of the threatened speech is the capacious, subjective language of § 10 and the unsuperintended discretion it affords, not the anecdotal allegations with which sponsors regaled Congress during the brief hours that § 10 was considered. *Cf. Estate of Cowart v. Nicklos Drilling*, 505 U.S. 469, 475 (1992); *West Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 97-98 (1991).

I.

ALL OF SECTION 10 IS IMPERMISSIBLY CONTENT-BASED, AND NO PART CAN BE IMMUNIZED FROM CONSTITUTIONAL REVIEW BY THE STATE ACTION DOCTRINE.

Recognizing (indeed conceding at oral argument below, Pet. 104a n.9) that §§ 10(a) and 10(c) could not pass muster under the First Amendment, the government attempts to avoid constitutional scrutiny altogether. Remarkably, the en banc majority decided that it need "not reach petitioners' First Amendment attack on sections 10(a) and 10(c)," because "a private cable operator may refuse to carry indecent programming without having its decision tested by First Amendment principles applicable to the government

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[13] *See also Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983).

[14] *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975) ("minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them") (citation omitted); *Bolger*, 463 U.S. at 74 n.30.

alone." Pet. 31a; *see* Pet. 11a-12a. However, because a cable operator may censor only under the authority and to the limited extent Congress devised in §§ 10(a) and 10(c), the court's holding is indefensible, and its reasoning is a non sequitur.

All statutes are subject to constitutional constraint and, therefore, necessarily to constitutional review. Properly analyzed, this case presents no state action issue at all, and § 10 is subject, in its entirety, to strict scrutiny.

A. The Court Must Determine the Validity of Section 10.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." Section 10 is plainly such a law and, thus, is subject to "the most exacting scrutiny," according to a long line of cases concerning "regulations that *suppress, disadvantage, or impose differential burdens* upon speech because of its content," *Turner*, 114 S. Ct. at 2459 (emphasis added), as well as cases concerning laws that directly burden expression.[15]

Before § 10's enactment, federal law and many state and local laws and agreements prohibited cable operators from interfering in *any* manner with programming on access channels, regardless of content,[16] because access channels' very *raison d'être* is to establish a forum in which persons other than large media companies can speak to the public in one of the Nation's most important mediums of communication. Now, however,

- section 10(a) authorizes and encourages[17] cable operators to ban

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[15] *E.g.*, *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989); *Meyer v. Grant*, 486 U.S. 414, 420 (1988); *see Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (law singling out small category of speakers for special treatment poses particular First Amendment dangers).

[16] *E.g.*, 47 U.S.C. §§ 531-32; N.Y. Exec. L. § 829; *see* JA 186 & n.7.

[17] Indeed, the purpose and effect of § 10 is actually to coerce cable operators to censor, because the alternative to § 10(a) censorship is the (continued...)

speech depending on its content — *i.e.*, programming that the operator "reasonably believes" to be "indecent" (a term Congress and the Commission defined) — and only if such programming is offered by a leased access cable programmer;

- section 10(c) authorizes and encourages cable operators to ban speech depending on its content — *i.e.*, programming that is "sexually explicit" or "solicits or promotes unlawful conduct" — and only if such programming is offered by a PEG access cable programmer;
- sections 10(a) and 10(b) require cable operators either to promulgate and enforce written policies banning speech believed to be indecent on leased access channels or to block such programming pursuant to Commission regulations;
- sections 10(a) and 10(c) authorize cable operators to pre-screen access programming for the sole purpose of ferreting out material that either they believe to be "indecent" or that "promotes" unlawful conduct;[18] and
- sections 10(a), 10(b), and 10(c) preempt all state and local laws, and all franchise or other agreements entered into pursuant to those laws, that prohibit cable operators from pre-screening, banning, blocking, or otherwise interfering with speech on access channels.[19]

Given those provisions, the content- and speaker-based lines they embody, and the stated purposes of the bill's sponsors, §§ 10(a) and 10(c) are core candidates for the exacting First Amendment review required by *Turner* and the cases cited above at 14 n.15.

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[17](...continued)
burdensome § 10(b) segregation and blocking scheme, and because § 10(d) threatens the operator with criminal liability for access programming with sexual content. *See* above at 5; *see also* Alliance for Community Media, JA 13-14, InterMedia Partners, JA 228-29.

[18] First Report, Pet. 151a n.39; *see* Second Report, Pet. 189a.

[19] First Report, Pet. 157 n.44; Second Report, Pet. 183a n.7.

The court of appeals' contrary conclusion was premised on the fact that the actor directly undertaking the newly authorized censorship decisions would be a private party, thereby rendering successful Senator Helms' attempt to craft anti-"indecency" legislation that would escape First Amendment scrutiny.[20] But it has long been the rule, both in cases challenging Commission action, *see Columbia Broadcasting Sys., Inc. v. United States*, 316 U.S. 407, 415-17 (1942), and elsewhere, that courts consider the harm that laws and rules are likely to cause, regardless of who "directly" causes the harm.

"[I]n passing upon constitutional questions the court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. 697, 708 (1931); *accord Federal Election Comm'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 255 (1986) (plurality opinion) ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities").[21]

Nothing in *Turner* or in any other case delineating the kinds of laws subject to exacting scrutiny suggests that a properly presented constitutional challenge can be not reached simply because the

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[20] "[T]here is no constitutional problem with this amendment because this is not governmental action. It is an action taken by a private party." 138 CONG. REC. S646 (daily ed. Jan. 30, 1992) (statement of Senator Helms); *see also id.* at S649 (statement of Senator Fowler) ("[Indecent and other undesired programming] should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it").

[21] *See also Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118-19 (1991) (considering effect on publishers' ability to pay authors); *Meyer v. Grant*, 486 U.S. at 423 (considering effect on candidates' ability to pay signature gatherers); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 97-98 (1982) (considering effect on minor parties' ability to operate effectively); *United States v. National Treasury Employees Union*, 115 S. Ct. 1003, 1014-15 (1995) ("*NTEU*") (considering effect of ban of honoraria on the flow of speech).

harms flowing from statutory implementation flow through private parties.[22]

Cases in other constitutional contexts make the same point and have subjected statutes to scrutiny even where no harm would have occurred unless a third party did something that it was authorized (but not compelled) to do. For example, this Court invalidated a statute authorizing cable operators to invade apartment buildings, even though the statute did not direct any entry whatsoever and merely "adjusted" property rights, leaving cable operators free to enter or not. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). Similarly, this Court struck under the Establishment Clause a statute authorizing churches and schools to veto applications for certain liquor licenses, even though churches are not state actors and were free to use the veto or not. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).[23]

The court of appeals' decision to "not reach" petitioners' First Amendment challenge, Pet. 31a, disregards the very provisions pursuant to which this action is brought. Congress directed the courts of appeals, in 28 U.S.C. §§ 2342, 2344, and 2349, to "determine the validity of . . . all final orders of the Federal Communications Commission," 28 U.S.C. § 2342(1), and "make

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[22] See *Nixon v. Herndon*, 273 U.S. 73 (1927) (statute disqualifying blacks from Democratic primary invalidated) and its progeny from *Nixon v. Condon*, 286 U.S. 73 (1932) to *Terry v. Adams*, 345 U.S. 461 (1953), all of which condemned what was effectively the same discrimination condemned under *Herndon*, only this time accomplished under re-designed statutes attempting to shield the discrimination from judicial review by clothing it as private action. As the Court observed in *Lane v. Wilson*, 307 U.S. 268, 275 (1939), the Constitution "nullifies sophisticated as well as simple-minded" efforts to effect unconstitutional outcomes.

[23] The court of appeals' refusal to reach a First Amendment challenge when harm would flow from the discretionary decisions of third parties is also at war with the line of cases from *NAACP v. Alabama*, 357 U.S. 449 (1958), to *Socialist Workers*, 459 U.S. 87. In each of those cases, *all* the harm complained of flowed from the acts of third parties, but this Court proceeded to the merits.

and enter . . . a judgment determining the validity of . . . the order of the agency," *id.* § 2349(a).

The courts could not "determine the validity" of the Commission's final rules, however, without considering properly presented constitutional challenges. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Indeed, it is axiomatic that in every proper case it is the court's duty "to say what the law is" and to refuse to give effect to a statute or regulation that violates the Constitution. *Id.* at 177. That is why this Court has routinely considered constitutional challenges in cases brought pursuant to 28 U.S.C. § 2342 (or its predecessor), without ever pausing to see "whether state action is present." *See, e.g., Midwest Video*, 440 U.S. 689; *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978); *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943).

For the court of appeals not to "reach" the challenge to §§ 10(a) and 10(c) — not even to *decide* whether the First Amendment forbids Congress from delegating to private parties the authority that they had theretofore lacked to censor speech depending on its content — violates both § 2342 and the obligation to say "what the law is" in a proper case.

The en banc court asserted that § 10 was not subject to review under the First Amendment because "it simply *adjusted* editorial authority between two private groups." Pet. 15a (emphasis added). So characterizing § 10 does not support an abdication of judicial review. Just the contrary, a legislative "adjustment" of who will have the right to speak would seem to provide a core occasion for review. *See PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (rejecting on the merits a claim that state's adjustment of right to speak on private property violated the Fifth and Fourteenth Amendments); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (upholding on the merits a challenge to state adjustment of right to speak in print publication); *Columbia Broadcasting Sys. v. Democratic Nat'l Comm.*, 412 U.S. 94 (rejecting on the merits a claim that the First Amendment required change in the existing distribution of speech rights on public airwaves).

This Court has insisted that "where legislative abridgment of [First Amendment] rights is asserted, the courts should be astute to examine the effect of the challenged legislation" and decide its constitutionality in "*every* case." *Schneider v. State*, 308 U.S. 147, 161 (1939) (emphasis added). The court of appeals disobeyed that mandate here when it chose to "not reach" petitioners' First Amendment attack on sections 10(a) and 10(c). Pet. 31a.

B. The Issue Is Whether Section 10 Violates the Constitution, Not Whether Particular Censorship Decisions of Cable Operators Would Be State Action.

1. The state action doctrine is inapposite.

Petitioners' challenge to the constitutionality of § 10 poses no state action question, and none need be resolved. The state action doctrine arises when a private party's actions are claimed to be subject to constitutional constraint, an issue this case does not raise.[24] It has no relevance to any question of whether particular statutes are somehow insulated from constitutional review.

Neither the court of appeals' lengthy discussion, nor any brief that the Commission submitted, cites *any* case refusing to reach a properly presented constitutional challenge to a statute or regulation upon a determination that actions taken pursuant thereto would not be "state action." Petitioners have not found a single case holding that a constitutional challenge to a statute need not be reached on state action grounds.[25]

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[24] *See* RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 16.1, at 524 (2d ed. 1992) ("All of the cases involving a state action issue have an essentially similar fact pattern. In these cases one individual citizen (the 'aggrieved party') feels that his freedoms or rights have been violated by the actions of another (the 'alleged wrongdoer')"); *see also, e.g., Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991); *Lugar v. Edmonson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

[25] Neither apparently has Professor Tribe, who notes that, "[i]f litigants challenge a federal or state *statute* . . . in a case where the validity of the

(continued...)

The court seemed to believe *Reitman v. Mulkey*, 387 U.S. 369 (1967), supported its decision, Pet. 16a-17a, but it does just the opposite. *Reitman*'s relevant teaching is not so much the 5-4 decision on the merits, but the Court's *unanimous* decision to reach the constitutionality of the state constitutional amendment repealing fair housing statutes and making future ones more difficult to enact. Although on the merits the four dissenting justices disagreed sharply, they found "*no question* that the adoption of § 26 . . . constituted 'state action' within the meaning of the Fourteenth Amendment. The *only* issue is whether this provision impermissibly deprives any person of equal protection of the laws." 387 U.S. at 392 (Harlan, J., dissenting) (emphasis added).[26]

To the same effect is *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987), another decision on which the government inexplicably relied. The relevant portion of that case is the disposition *on the merits* of the facial challenge to a statute as violative of free speech rights, even though no speech would have even been arguably impaired unless a private party took the action that the statute authorized but did not compel. Because the constitutionality of a federal statute was challenged, the Court was obliged to reach and decide the merits of the First Amendment attack, and every member of the Court did.[27]

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[25](...continued)
statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed." LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 18-1, at 1688 (2d ed. 1988); *see also* ROTUNDA & NOWAK, § 16.1, at 524 ("When a legislature, executive officer, or a court takes some official action . . . , that action is subjected to review under the Constitution, for the official act of any governmental agency is direct governmental action and therefore subject to the restraints of the Constitution").

[26] Post-*Reitman* cases involving repeals of anti-discrimination measures reached and decided the merits as well. *See, e.g., Crawford v. Board of Educ.*, 458 U.S. 527 (1982); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982).

[27] This Court only had occasion to discuss state action when it moved to (continued...)

This Court has insisted on "careful attention to the gravamen of the plaintiff's complaint" in considering state action issues. *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). Here, the petitions for review challenged the validity of § 10 and its implementing regulations under § 2342 and did not raise the question whether "the operators' exercise of . . . discretion [is] state action subject to the First Amendment," Pet. 15a (as posed by the en banc court).

2. Section 10 does not "restore" rights to cable operators, and a partial restoration is constitutionally reviewable in any event.

The court of appeals' decision to "not reach" petitioners' challenge to §§ 10(a) and 10(c) rested largely on its assumption that Congress had merely "restored" to cable operators some "editorial control" that they supposedly had over access channels prior to the 1984 Act. Pet. 13a-17a. That assumption is factually wrong and would not, in any event, justify letting § 10 escape judicial review.

Access channels are creatures of state or federal law or local franchise agreement, for which cable operators function simply as conduits and over which they never had editorial control. Even prior to 1984, state law (the source of property rights) and franchise agreements generally required access channels and prohibited cable operator censorship thereof, even before any given system was even constructed. *See* above at 2, 3. The Commission's early regulations carving out an exception to this no-censorship rule for "obscene or indecent" programming were a *mandate*, not a grant of editorial discretion, and never even went into effect, having been recognized as flatly unconstitutional. *See* above at 3 n.1. Judge Randolph was therefore mistaken when he relied on a supposed pre-1984 state-of-nature where operators had editorial control over alleged indecency on cable access. Pet. 14a. Moreover, as to

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[27](...continued)
the distinct question of whether post-enactment enforcement decisions made by an ostensibly private party as to which of various possible infringers to sue (discretionary decisions that Congress did not constrain or selectively authorize) violated the Fifth Amendment. 483 U.S. at 542.

leased access, § 10 cannot fairly be characterized as restoring "editorial control"; rather, it permits only a highly constrained choice between two speech-limiting alternatives. Pet. 47a (Wald, J., dissenting).

But even assuming *arguendo* that Congress could grant cable operators full editorial control over locally created PEG access channels and over leased access channels without violating the First Amendment, it may not partially and selectively grant editorial control in a way that suppresses, disadvantages, or imposes differential burdens on speech because of its content. *Turner*, 114 S. Ct. at 2459. "[E]ven a traffic regulation cannot discriminate on the basis of content . . . ." *Erznoznik*, 422 U.S. at 215; *e.g.*, *Simon & Schuster*, 502 U.S. at 116 ("the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace"); *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991).

If the constitutional rule were otherwise, no court could consider and decide a First Amendment challenge to a statute selectively "restoring" the rights of cable operators to censor on access channels the speech of African-Americans or socialists or speech opposing reduction of welfare grants. Actions taken under the authorization of such a statute would be merely "restoration," not state action, and the statute itself would (under the court's reasoning) be "immunized" from constitutional challenge.[28] But such statutes are, of course, facially unconstitutional and subject to judicial review in a proper challenge, regardless of whether the cable operator's censorship as authorized by statute would itself violate the Constitution.[29]

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[28] Other examples make the same point: for instance, a law selectively "restoring" to telephone companies (otherwise obligated to provide universal service) the power to deny service to any customer who believes in Christianity or who publicly supports telecommunications reform.

[29] *Cf. DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 n.3 (1989) (although a state may fail to protect its citizens generally without running afoul of the due process clause, it "may not, of

(continued...)

In short, as Judge Wald observed (Pet. 50a n.4), the court of appeals erred in supposing that whether a law is subject to review under the Constitution, and whether all action taken under its cloak is state action, are the same question.

3. Section 10 cannot escape constitutional scrutiny, because it preempts contrary state law, significantly encourages content-based censorship, and embroils the Commission as a joint participant in the censorship scheme.

Additional factors confirm beyond doubt that § 10 is subject to constitutional scrutiny. First, § 10 is subject to review (or, in the court of appeals' imprecise formulation, "state action is present") because it preempts contrary state law. *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956).

In *Hanson*, a group of employees, who chose not to join a union in reliance on the Nebraska "right-to-work" law, sued their company and its union over the inclusion of a closed-shop agreement in the labor contract, which they claimed violated their First Amendment rights. Even though the Railway Labor Act had merely authorized, but in no way *required*, the challenged closed-shop agreement, and even though the decision to require one was made by the union and company alone, this Court unanimously agreed that the constitutional question tendered had to be decided. "If private rights are being invaded, it is by force of an agreement made pursuant to federal law which expressly declares that state law is superseded." 351 U.S. at 232.[30]

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[29](...continued)
course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause").

[30] The government has asserted that *Hanson* has been essentially overruled, relying upon *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). *Jackson*, however, did not deal with preemption, much less with a facial challenge to a statute that on its face authorized previously forbidden constitutional actions. This Court has subsequently and repeatedly reaffirmed *Hanson*'s rationale. *E.g.*, *Communications Workers*

(continued...)

Section 10 is subject to review under *Hanson*, because it is similarly preempting and subjects programmers to censorship despite otherwise enforceable state law rights (including municipal franchises) to be free from such censorship. Second Report, Pet. 183a n.7.

Second, the reviewability of §§ 10(a) and 10(c) follows *a fortiori* from *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). *Skinner* subjected to constitutional scrutiny a statute that permitted (but did not compel) private drug testing, noting that "the Government did more than adopt a passive position towards the underlying private conduct." *Id.* at 615; *see also Blum v. Yaretsky*, 457 U.S. at 1004 (government's "significant encouragement" of private conduct creates state action); *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) ("'a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish'") (citation omitted). As in *Skinner*, the government has in § 10 adopted more than a passive position, for it has imposed definitions of disfavored speech and erected a separate statutory scheme to regulate such speech.

Finally, §§ 10(a) and 10(b) establish a comprehensive scheme to censor "indecency" on leased access channels with private cable operators and the Commission playing interlocking roles: the Commission defines indecency, resolves certain disputes over its application, and prescribes blocking and segregation requirements, while the cable operators determine what programming falls within their "reasonable belief" of indecency and decide whether to ban or block such programming pursuant to the choice Congress has imposed. Such a joint enterprise between government and private actors is subject to constitutional scrutiny. *See Skinner*, 489 U.S. at 615; *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970).[31]

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[30](...continued)
of Am. v. Beck, 487 U.S. 735, 761 (1988); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977).

[31] See Pet. 46a-53a (Wald, J., dissenting) for a further explanation of the (continued...)

II.

SECTION 10 IS UNCONSTITUTIONAL BECAUSE IT AUTHORIZES AND REQUIRES CENSORSHIP UNDER VAGUE STANDARDS AND LACKS ESSENTIAL PROCEDURAL SAFEGUARDS.

To ensure the "[p]recision of regulation" that "must be the touchstone" when free expression is concerned, *NAACP v. Button*, 371 U.S. 415, 438 (1963), laws regulating speech must not be vague and must include procedural safeguards to secure the prompt restoration of protected speech when it has been improperly censored. Section 10 fails both requirements.

A. Section 10 Is Completely Vague.

1. Laws that inhibit free speech are subject to the most "stringent" standards of precision. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278, 287 (1961).[32] Vague laws touching speech invite over-censorship and viewpoint-based enforcement by granting censors "unbridled discretion." *See, e.g., Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132 (1992); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975) (condemning denial of access to a municipal theater where "the exercise of such authority was not bounded by precise and clear standards"); *Smith v. Goguen*, 415 U.S. 566, 574-75 (1974).[33]

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[31](...continued)
joint §§ 10(a) and 10(b) scheme. Even under § 10(c), the Commission is a joint participant in operators' censorship: it defines the disfavored ideas and directs operators that they may require programmer certifications. Petitioners also join in the argument of petitioners in no. 95-227 that censorship of speech in a public forum such as cable access channels is always subject to constitutional scrutiny.

[32] *See Hynes v. Mayor & Council of Oradell*, 425 U.S. 610, 620 (1976) ("general test of vagueness applies with particular force in review of laws dealing with speech").

[33] *Cf. City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, (continued...)

Vague laws also pose an unacceptable risk of self-censorship, because speakers who cannot discern clear lines will "'steer far wider of the unlawful zone' than they would if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quoting *Speiser v. Randall*, 357 U.S. 513, 526 (1958)); *see Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (vague laws fail to "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly"); *see also Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1051 (1991).

Thus, vague laws attempting to regulate or suppress non-obscene speech have been repeatedly struck down,[34] even when enacted to protect minors.[35] Illustrative is *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676 (1968), where this Court invalidated an ordinance requiring film classification and prohibiting attendance by youths under 16 at films classified "not suitable for young persons." Although the "not suitable" standard had been fleshed out — defined as "describing or portraying nudity beyond the custom-

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[33](...continued)
762-69 (1988); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (vague statutes permit those implementing them "'to pursue their personal predilections'") (citation omitted).

[34] *E.g.*, *Winters v. New York*, 333 U.S. 507 (1948) (statutory standard interpreted by state court to be "criminal news or stories of deeds of bloodshed or lust, so massed as to become vehicles for inciting violent and depraved crimes"); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacrilegious" as a licensing standard); *Gelling v. Texas*, 343 U.S. 960 (1952) (per curiam) ("prejudicial to the best interests of the people of said City"); *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587 (1954) (per curiam) ("moral, educational, or amusing and harmless"); *Holmby Prods., Inc. v. Vaughn*, 350 U.S. 870 (1955) (per curiam) ("cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals").

[35] *E.g.*, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59 (1963) (condemning a commission that was charged with reviewing material "manifestly tending to the corruption of the youth.").

ary limits of candor in the community, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest," *id.* at 681 — eight members of the Court concluded that, in the end, "'[t]he only limits on the censor's discretion is his understanding of what is included within the term "desirable, acceptable or proper." This is nothing less than a roving commission.'" *Id.* at 688 (citation omitted).[36]

Interstate Circuit rejected the argument that a vague standard was permissible so long as "it was adopted for the salutary purpose of protecting children." *Id.* at 689. "The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children." *Id.* Rather, it depends on the harm to free expression, regardless of an assertedly narrow interest in protecting children.

> [A] local exhibitor who cannot afford to risk losing the youthful audience . . . may contract to show only the totally inane. The vast wasteland that some have described in reference to another medium might be a verdant paradise in comparison. The First Amendment interests here are, therefore, broader than merely those of the film maker, distributor, and exhibitor, and certainly broader than those of youths under 16.

Id. at 684.

2. Section 10's fulcrum is the phrase "indecent programming," defined as "any programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. § 76.701(g), Pet. 172a. Programmers must

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[36] Notably, the Dallas ordinance posed far less damage to First Amendment rights than § 10 does, because it did not censor outright all pictures classified as "not suitable," did not make speech unavailable to adults, treated all minors 16 and over as if they were adults, and afforded minors the opportunity to view "unsuitable" films with their parents.

identify "any programming that is indecent"[37] on pain of a damoclean array of sanctions and remedies that include censorship of individual programs, financial penalties, and denial of access to a program provider in the future. *Id.* § 76.701(f), Pet. 172a; *see also* First Report, Pet. 168a. Operators are given wide discretion to require more, including certifications that particular programming (or all programming) is not "indecent" or that "reasonable efforts" will be undertaken to "insure" that indecent live programming will be prevented. *Id.* § 76.701(e), Pet. 172a; *id.* § 76.702, Pet. 197a-98a. Operators may suppress or must block "indecent programming" and may pre-screen in order to do so. *Id.* § 76.701(a), Pet. 171a; *id.* § 76.702, Pet. 197a-98a; First Report, Pet. 151a n.39.

The definition of "indecent" under § 10 is substantially more vague than the familiar three-part test upheld against a vagueness challenge by a 5-4 decision in *Miller v. California*, 413 U.S. 15 (1973), because it utterly dispenses with two parts of that triangulated test. Programmers, operators, and indeed the Commission and courts are deprived of the substantial instruction and constraint that *Miller* affords by restricting obscenity to "hard-core pornography," and then to only those patently offensive works that, "as a whole, appeal to the prurient interest" and, "taken as a whole, do not have serious literary, artistic, political, or scientific value." *Id.* at 24. Unlike the hard-core pornography to which *Miller* restricted itself, a category that Justice Stewart memorably described with the phrase "I know it when I see it," *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion), "indecency" encompasses a broad and undefined category that appears to extend far beyond even "soft-core" pornography and that no member of this Court has ever suggested is recognizable on sight.

Just as there is no telling how a stool with two of its three legs sawed off will land, no one can know what may be proscribed when "indecency" means only what is "patently offensive" by "contemporary community standards": terms that prescribe no ascertainable standard of conduct at all and are, therefore, "perfectly vague." *See, e.g., Smith v. Goguen*, 415 U.S. at 573 (invalidating a law

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[37] 47 C.F.R. § 76.701(d), Pet. 171a.

barring "contemptuous" treatment of the flag, because "'[w]hat is contemptuous to one man may be a work of art to another'") (citation omitted); *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (ordinance barring "annoying" conduct is "vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all").[38]

Moreover, § 10 regulates speech exclusively on a basis ("offensiveness") that this Court has repeatedly said is constitutionally impermissible. *See, e.g., Texas v. Johnson*, 491 U.S. at 414 (government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Cohen v. California*, 403 U.S. 15, 25 (1971) ("the State has no right to cleanse public debate" of certain "offensive" words); *Bolger*, 463 U.S. at 71 ("offensiveness" is not a justification for suppressing expression).

Comments from cable operators show precisely how widely these delegate censors will steer, untethered by any clear and ascertainable standard. *E.g.*, Acton Corp., JA 1-2; Community Antenna Television Ass'n, Inc., JA 175-76; NYNEX Tel. Cos., JA 377, 383-84; *see also Goldstein v. Manhattan Cable Television, Inc.*, No. 90 Civ. 4750, 1995 WL 562182 (S.D.N.Y. Sept. 20, 1995). The wages of imprecision will be the routine suppression of fully

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[38] *See also Southeastern Promotions*, 420 U.S. at 552-53 ("clean and healthful and culturally uplifting" standard gives city "unbridled discretion"); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 149-51 (1946) (application of a "not morally improper" standard would be sanctioning censorship); *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 573 (9th Cir. 1984) ("family entertainment" standard "does not . . . provide a standard sufficient to limit arbitrary and capricious action"), *cert. denied*, 471 U.S. 1054 (1985); *Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035-40 (D.C. Cir. 1980); *Finley v. NEA*, 795 F. Supp. 1457, 1471-72 (C.D. Cal. 1992) (striking down "general standards of indecency" requirement because "the very nature of our pluralistic society is that there are an infinite number of values and beliefs and, correlatively, there may be no national 'general standards of decency'") (appeal pending).

protected speech — not just "obscenity lite," but speech of substantial value, Pet. 44a-45a & n.1 (Wald, J., dissenting) — and the contraction of what is available to "the totally inane." *Interstate Circuit*, 390 U.S. at 684. The opportunity for cable access channels to offer viewers some relief from the "vast wasteland" on broadcast and most operator-programmed channels — to see the works of artists such as Courbet or Rodin or Picasso (some of which depict sexual organs), or films like *Putney Swope* (with a classic scene at the urinal) or *Carnal Knowledge* (found protected in *Jenkins v. Georgia*, 418 U.S. 153 (1974)), or educational works on breast or testicular self-examination — would be further diminished, or dashed.

Section 10's self-certification requirements magnify the chilling effect, as this Court's prior cases invalidating oaths disclaiming certain kinds of speech attest. *Baggett v. Bullitt*, 377 U.S. at 372 ("uncertain meanings of . . . oaths require the oath-taker . . . to 'steer far wider of the unlawful zone'") (citation omitted); *Cramp v. Board*, 368 U.S. at 286; *see also Bella Lewitzky Dance Found. v. Frohnmayer*, 754 F. Supp. 774, 782-83 (C.D. Cal. 1991).

The consequence of the over-aggressive deployment of the operator's or the Commission's imprecise censorial power, or even a programmer's wrong guess, is not merely channeling certain language to a later hour, as in *Pacifica*, 438 U.S. 726, or even a stay of cablecasting pending prompt judicial review. Rather, the consequence is a final restraint of protected speech for adults as well as children: speech that the programmer has a constitutional right to present and viewers to receive. Such DAETC programs as a cinema verité self-help gynecological exam, a documentary on arts censorship, or a traditional Japanese fertility festival featuring a procession of markers with images of human genitalia (JA 224-25) would surely court suppression by operators under such a standard, regardless of whether, at the end of years of litigation (assuming that DAETC had the resources to pursue it), an operator's belief that programming was "indecent" was found unreasonable.[39]

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[39] Moreover, once censorship occurs, few programmers will be able to (continued...)

There are still other aspects in which the cable "indecency" standard is patently vague. First, and crucially important from the standpoint of vagueness, the "reasonable belief" standard in § 10(a) substantially exacerbates the statute's imprecision and potential for discriminatory enforcement. Unlike the Commission's broadcast indecency standard, which is at least applied by one agency,[40] § 10(a)'s invitation is to censor not only the "indecent" (as it might be measured judicially) but also what an operator "reasonably believes" is indecent: a far bigger kettle of fish. Imprecision and self-censorship are therefore multiplied. *See* Schwartz Decl., JA 390, 392-94. Doubly subjective judgments are particularly indeterminate.[41] *Big Mama Rag*, 631 F.2d at 1037-38; *Stanton v. Brunswick Sch. Dep't*, 577 F. Supp. 1560, 1574 (D. Me. 1984). Thus, this Court in *Interstate Circuit*, striking down as vague a movie classification ordinance, pointed particularly to the ordinance's relegation of decision-making to "the judgment of the [classification] Board." 390 U.S. at 681. Likewise, in *Bella Lewitzky*, 754 F. Supp. at 781-82, the court invalidated as vague the NEA's obscenity oath because it relied on the agency's unreviewable "judgment" as to what is obscene.

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[39](...continued)
afford lengthy proceedings seeking redress, especially when delays to decision are inevitable given the various defenses for operators to assert, including "reasonable belief," which would likely forestall courts from reaching the substantive merits altogether, and the contention that no cause of action is available under the Communications Act.

[40] As noted below at II.B, this Court has never upheld the broadcast standard against a constitutional vagueness challenge, and one lower court that did so explicitly welcomed "correction from Higher Authority," *Action for Children's Television v. FCC*, 852 F.2d 1332, 1339 (D.C. Cir. 1988).

[41] The gap between the two standards is comparable to the gap between "real probable cause" and the easier-to-make-out standard of "good-faith belief" reflected in *United States v. Leon*, 468 U.S. 897 (1984), or between actual constitutional violations and "good-faith" qualified immunity under 42 U.S.C. § 1983.

The cable "indecency" standard is "based on the 'average cable subscriber' . . . not confined to a specific geographical area or specific cable system." First Report, Pet. 148a-49a. This Court has recognized, however, that "our Nation is simply too big and too diverse for this Court to reasonably expect that such standards [as 'patently offensive'] could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists." *Miller v. California*, 413 U.S. at 30.[42] Both cable operators and programmers are left wholly without guidance as to who such an "average cable subscriber" is and how the standard relates to current cable programming in Los Angeles, Kalamazoo, New York, or Salt Lake City.

Finally, the dangers of arbitrary action, and indeed self-censorship, are magnified because under § 10 operators need not prohibit or block comparably "indecent" programs on their own channels, and, thus, access programmers cannot gain any useful guidance or comfort from comparing their own programming to other programs carried on the system.[43] The presence of any comparable or even more sexually explicit program is absolutely no assurance that a cable operator or the Commission would not find an access program to be "indecent."[44]

B. *Pacifica* Is Not Controlling.

1. *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), does not foreclose petitioners' vagueness challenge to § 10's definition of "indecency." Its "emphatically narrow" holding addressed only the facts of that particular adjudication (the monologue "as broadcast"), stressed that the seven words at issue were at the very core of the

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[42] *See also Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 125 (1989); *Smith v. Goguen*, 415 U.S. at 574 (because of "widely varying attitudes and tastes," a ban on "contemptuous" treatment of the flag provided no meaningful guide to conduct or enforcement).

[43] Indeed, cable operators may even ban some "indecent" programs on access channels and only block the others. First Report, Pet. 151 n.39.

[44] *See* Schwartz Decl., JA 393 (noting that "REAL SEX" on HBO and THE PLAYBOY CHANNEL are carried on many systems).

statutory proscription, and expressly disclaimed any opinion on the facial validity of the "indecency" standard of 18 U.S.C. § 1464.[45] The Court noted that no sanctions had been imposed or would be "without warning." *id.* at 743. The Court narrowed its decision even further by expressly limiting its fact-specific ruling to the broadcast medium and to a nuisance (channelling) rationale. *Id.* at 750; *see Sable*, 492 U.S. at 127-28 (*Pacifica* was "an emphatically narrow holding"); *Bolger*, 463 U.S. at 74.[46]

Pacifica did not purport to overrule the vagueness cases cited above at 25-26. It did not consider a "reasonably believes" standard heaped onto an "indecency" standard or the authorization of a total ban. Nor did it consider "indecency" under the shadow of the Commission's since-greatly expanded sense of what falls within that rubric: not just dirty words, but, as the record shows here, speech of serious value, whose

> very merit will [often] be inseparable from its seminal "offensiveness." A bowdlerized documentary on the Mapplethorpe exhibit which did not include some description or depiction of Mapplethorpe's sexually explicit photographs themselves, for example, would hardly be an informative statement on the artistic and political debate the exhibit

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[45] This Court observed that the Commission had not engaged in rule making and that its review was "limited to the question whether the Commission has the authority to proscribe this particular broadcast." 438 U.S. at 742; *see id.* at 734. The Court further stressed that "the time of day" in which an indecency standard applied was "all-important" and cautioned that it was not passing on the facial validity of "indecency," much less approving it as a permissible standard for prohibition as opposed to channelling. *Id.* at 750.

[46] Indeed, Pacifica did not contest that the Carlin monologue fit the Commission's definition. 438 U.S. at 739. Commentators, including the author of the *Pacifica* plurality opinion, have since suggested that the station would probably have won its case had it challenged the Commission's sanction on the specific facts presented. *E.g.*, Hon. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1307 (1993); Daniel Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 757 (1980).

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Pet. 45a (Wald, J., dissenting).[47] By contrast, Justice Stevens' plurality opinion in *Pacifica* reveals time and again that it was considering "indecent *language*"; not, as § 10 and its regulations do, "indecent programming."[48]

In short, *Pacifica* simply did not decide whether "indecency" as defined here by Congress and the Commission is sufficiently definite for a scheme of delegated censorship under a "reasonable belief" standard that escapes judicial and even administrative superintendence.

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[47] Documenting the Commission's dramatic expansion of "indecency," see Public Notice, 2 FCC Rcd 2726 (1987); *Infinity Broadcasting*, 3 FCC Rcd 930 (1987); *KSD-FM*, Notice of Apparent Liability, 6 FCC Rcd 3689 (1990) (newsworthy nature of broadcast would be a factor but would not be dispositive in "indecency" determination); *Pacifica Found.*, 2 FCC Rcd 2698 (play dealing with AIDS and homosexuality), *recon. & clarif. granted in part*, 3 FCC Rcd 930 (1987); *Action for Children's Television*, 852 F.2d at 1336; John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 338-41 (1989) (describing indecision over broadcast of ULYSSES); Richard G. Passler, *Regulation of Indecent Radio Broadcasts: George Carlin Revisited — What Does the Future Hold for the Seven "Dirty" Words?*, 65 TUL. L. REV. 131, 140 (1990) (noting the Commission's "new, more generic standard expanded the definition of indecent language beyond anything the Court in *Pacifica I* ever envisioned"); Steven Nudelman, *A Chilly Wait in Radioland: The FCC Forces "Indecent" Radio Broadcasters to Censor Themselves or Face the Music*, 2 J.L. & POL. 115 (1994).

[48] Thus, faced with a statute that on its face reached only "obscene, indecent, or profane *language*," 18 U.S.C. § 1464 (emphasis added), and with the Carlin monologue, the Court wrote that there are "few, if any, thoughts that cannot be expressed by the use of less offensive language." 438 U.S. at 743 n.18. But the Commission's focus has moved well beyond "dirty words," and its regulation of "indecent programming" sets at risk a host of valuable programs on such subjects as artists, reproductive health, breast or testicular cancer, and anthropology, which would be entirely unviable, or rendered far less effective, if stripped of all depiction or description of "sexual or excretory activities or organs."

2. If *Pacifica* were found to have decided the vagueness question, it should be reconsidered and overruled. Whatever national consensus might have permitted anyone to find seven dirty words patently offensive as broadcast in the mid-afternoon 20 years ago cannot render the Commission's § 10 indecency standard sufficiently precise for now and beyond. Times and mores have changed. Ask any ten Americans from different communities what is patently offensive to the average cable subscriber, and you will have ten answers. Those in their 20's would give vastly different answers than their grandparents.

Sexual politics, *i.e.*, discussions of relationships between and among the sexes, have become a major issue for public debate. Public proceedings concerning sexual harassment and "date rape" are broadcast or cablecast on television. Depiction of "sexual organs" are commonplace, not only in "adult" materials, but in mainstream magazines, advertisements, and motion pictures. *The Simpsons*, enjoyed by millions of children and adults on broadcast TV, recently (December 3) showed each family member in the buff and Bart engaging in an "excretory activity." In the film *ET*, which millions of young children watch on video cassette in the home, one child calls another "penis-breath." The speech of artists and journalists, and of many from all walks of life whose voices are not otherwise heard on broadcast and most cable systems, also frequently embraces such politically sexual issues as rape and domestic violence, safe sex, and, indeed, the nature of sexuality itself. *See* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 125 (1994).

The rationales underlying the plurality opinion in *Pacifica* have substantially weakened since 1978. The current viability of the "pig in the parlor" rationale is questionable in light of the availability of lockboxes and other parental control mechanisms. Moreover, in contrast to the plurality's relegation of "indecent" language to diminished constitutional status, the Court's subsequent majority

decision in *Sable* establishes that indecent but not obscene expression has full First Amendment protection.[49]

Petitioners see no occasion here for reconsidering *Pacifica*, but if the Court concludes that that case controls this vagueness challenge, then *Pacifica* should be limited to its facts or overruled.

C. Section 10 Lacks Essential Procedural Safeguards.

The immediate, intended, and direct impact of a cable operator's exercise of the censorship power created by § 10 is to restrain protected speech permanently and in advance of its communication. In §§ 10(a) and 10(c), Congress authorized cable operators to censor outright protected speech: not only speech that is asserted (but has never been judicially found) to be "indecent," but also the substantially broader category of speech that the operator "reasonably believes" to be indecent. Congress and the Commission did precisely what this Court has repeatedly condemned: they gave censors "wide discretion" to restrain speech depending on their predilections.[50]

Thus, "[c]able operators may, if they choose, pre-screen programming as a means to enforce any cable operator policies adopted under the authority of section 10(a)." Second Report, Pet. 151a n.39. This is the classic form of prior restraint, under a long line

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[49] In addition, as Justice Stewart and three other dissenters in *Pacifica* persuasively argued, the term "indecent" in 18 U.S.C. § 1464 is most reasonably read to be simply a synonym for "obscene," particularly in view of the constitutional difficulties created by a more expansive definition. 438 U.S. at 777-80; *see* 47 U.S.C. § 532(h) (referring to cable service that is "obscene, or . . . indecent *or is otherwise unprotected by the Constitution*") (emphasis added).

[50] *E.g.*, First Report, Pet. 143a ("Congress intended to provide cable operators wide discretion"); *id.*, Pet. 144a-45a ("Given the wide discretion Congress afforded . . . , we see no reason to dispute" that "cable operators have the discretion to prohibit some, but not necessarily all, indecent programming"); Second Report, Pet. 189a ("section 10(c) was intended to afford cable operators broad discretion [under] section 10(c)," including banning of "indecent" programs on some but not all access channels).

of cases condemning the power to pre-screen and prohibit absent specific procedures, which are entirely unavailable here.[51]

Less bluntly but just as surely, § 10(b), too, interdicts speech that willing viewers would otherwise access. To the extent that cable operators do not prohibit all indecent speech on leased access channels, they must withhold it from every subscriber unless the subscriber requests the speech, and even then for an additional thirty days. 47 C.F.R. § 76.701(d), Pet. 171a.

Because this system of content-based prohibitions, restraints, and delays is "indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions," it "'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'" *Southeastern Promotions*, 420 U.S. at 552, 559 (quoting *Freedman v. Maryland*, 380 U.S. at 58).

> *First*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. *Second*, any restraint prior to judicial review can be imposed only for a specialized brief period and only for the purpose of preserving the status quo. *Third*, a prompt final judicial determination must be assured.

Id. at 560 (discussing *Freedman v. Maryland*, 380 U.S. 51).[52]

Section 10's censorship scheme lacks each of those requirements.[53] The censor bears no burden of promptly instituting

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[51] *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990); *Riley v. National Fed'n of Blind of N.C., Inc.*, 487 U.S. 781 (1988); *Freedman v. Maryland*, 380 U.S. 51, 58 (1965).

[52] *See also FW/PBS*, 493 U.S. at 229 (all three *Freedman* factors are applicable where, as here, a "censor [is] engaged in direct censorship of particular expressive material"); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 367 (1971); *Blount v. Rizzi*, 400 U.S. 410, 419-21 (1971); *Teitel Film Corp. v. Cusack*, 390 U.S. 139 (1968).

[53] The Commission found procedural safeguards unnecessary on the

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judicial (or any other) proceedings. Under § 10, a cable operator, having pre-screened or obtained information about a program, simply censors it, thereby suppressing it to all viewers, or blocks it, thereby suppressing it to all blocked viewers unless they learn of the program and request it at least thirty days in advance. The viewer or programmer, not the operator, must "assume the burden of instituting judicial proceedings and of persuading the courts that the [program] is protected expression," *Freedman v. Maryland*, 380 U.S. at 59-60, assuming *arguendo* that there is a cause of action to challenge particular acts of censorship. The operator's censorship is thus final, not provisional or brief, expressly so under §§ 10(a) and 10(c) and as a practical matter under § 10(b). Given the absence of any provision for "judicial superintendence" at all,[54] there is naturally no provision for prompt judicial review to restore free speech rights when they have been "erroneously denied."

In sum, § 10 is unconstitutional because it provides for censorship without required procedural protections.

III.

SECTION 10'S CONTENT-BASED DIRECT BURDENS ON FREE SPEECH RIGHTS VIOLATE THE FIRST AMENDMENT.

1. Section 10 "amounts to raw censorship based on content, censorship forbidden by the text of the First Amendment and well-settled principles protecting speech and the press. That ought to

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[53](...continued)
theory that any censorship under §§ 10(a) and (c) would be private action, even though the government defines the speech to be censored and prescribes regulations (§ 10(c)) or written policy requirements (§ 10(a)) under which the censorship takes place. *See* Second Report, Pet. 193a n.17. Delegation of censorship to private decision-makers is of course no answer to the insurmountable due process problems that result. *See National Ass'n of Theatre Owners, Inc. v. Motion Picture Comm'n*, 328 F. Supp. 6 (E.D. Wis. 1971); *Engdahl v. City of Kenosha*, 317 F. Supp. 1133 (E.D. Wis. 1970); *Motion Picture Ass'n of Am. v. Specter*, 315 F. Supp. 824 (E.D. Pa. 1970).

[54] *See Interstate Circuit*, 390 U.S. at 686 (citing cases).

end the matter." *Simon & Schuster*, 502 U.S. at 128 (Kennedy, J., concurring). As Justice Kennedy pointed out, the strict scrutiny test was imported from equal protection jurisprudence and "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only." *Id.* at 124. Because § 10 authorizes the prohibition of speech based solely on its content, it should be invalidated without further inquiry into whether this plain First Amendment violation also narrowly advances compelling government interests. *Id.* at 124-128.

2. Even assuming *arguendo* that a content-based authorization to prohibit a huge amount of protected speech (when engaged in only by certain speakers) is not invalid per se, § 10 cannot survive the "the most exacting scrutiny" to which it is, at a minimum, subject. *Turner*, 114 S. Ct. at 2459.[55] Under strict scrutiny the government must prove (not merely assert) that the regulations are necessary and narrowly tailored to achieve compelling governmental interests that cannot be otherwise achieved. *Id.* at 2469 (requiring such proof even under intermediate review); *see, e.g., Sable*, 492 U.S. at 126; *Simon & Schuster*, 502 U.S. at 118.

A challenged regulation is not "narrowly tailored" if it is significantly overinclusive, burdening speech that need not be burdened to achieve the government's compelling interest. *See id.*

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[55] *See* above at 14. Neither the Commission nor the court of appeals doubted that § 10 is subject to strict scrutiny to whatever extent it is subject to constitutional review at all. *See* Pet. 32a-34a; Pet. 131a-40a. Until this case, the courts had unanimously held that restrictions on "indecent" cable programming violate the First Amendment *E.g., Wilkinson v. Jones*, 480 U.S. 926 (1987) (mem.), *aff'g* 800 F.2d 989 (10th Cir. 1986), *aff'g* 611 F. Supp. 1099 (D. Utah 1985). *See also Goldstein v. Manhattan Cable Television Inc.*, No. 90 Civ. 4750, 1995 WL 562182 (S.D.N.Y. Sept. 20, 1995); *Altmann v. Television Signal Corp.*, 849 F. Supp. 1335 (N.D. Cal. 1994); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982).

at 121-22 (invalidating New York's Son-of-Sam law because it burdened "a wide range of literature" whose burdening could not be defended by the asserted justification); *see also NTEU*, 115 S. Ct. at 1012-15 (well-intended but overbroad honoraria ban would have prohibited payment for works by Hawthorne, Melville, Whitman, and Harte); *Texas v. Johnson*, 491 U.S. at 407-10 (statute reached far more speech than necessary to advance interest in preserving order).

A challenged law will also fail strict scrutiny if it is significantly underinclusive, failing to reach other conduct and speech that poses the same harm. *Florida Star v. BJF*, 491 U.S. 524, 541-42 (1989) (Scalia, J., concurring in part and in judgment) ("a law cannot be regarded as protecting an interest 'of the highest order,' and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited") (citation omitted); *see also Simon & Schuster*, 502 U.S. at 123 (Blackmun, J., concurring); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Carey v. Brown*, 447 U.S. 455, 465 & n.9 (1980). Thus, the government must prove the necessity not only for § 10 as a whole, but also for the content- and speaker-based distinctions embodied in § 10: here, that it is necessary to restrict only the "indecent" speech of access programmers. *Minneapolis Star*, 460 U.S. 575; *Leathers v. Medlock*, 499 U.S. at 447.

The government has an interest in enabling parents to protect their children from harm and, one may assume, in directly protecting children from harm in circumstances where parental supervision is likely to be systematically or structurally impracticable.[56] Even

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[56] The many cases recognizing a strong interest in enabling parents to control their upbringing of their children are inconsistent with an independent governmental interest in protecting children from non-obscene speech contrary to parental wishes, as Chief Judge Edwards observed, Pet. 77a. *See, e.g., Bolger*, 463 U.S. at 73, 75 (right of parent to provide children with materials government deems harmful); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968) ("the prohibition against sales to minors does not bar parents who

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so, however, § 10 is far from the least restrictive means available to achieve it.

A. Sections 10(a) and 10(c) Are Not Narrowly Tailored.

The government's concession that §§ 10(a) and 10(c) are invalid if they are subject to constitutional review is dispositive and, in view of *Sable*, inevitable. It is apparent from examining the "likely" and "practical" effect that § 10 will have, as is required (*see* above at 16), that it will suppress a wide range of protected and valuable speech from a vital avenue of communication, cable television. Speech that would otherwise be communicated and eagerly received will be prohibited across the board, rendered unavailable not only to young children, but also to older teenagers and adults. "'Surely this is to burn the house to roast the pig.'" *Sable*, 492 U.S. at 127 (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)); *see also Sable*, at 127 ("*Pacifica* is readily distinguishable from this case, most obviously because it did not involve a total ban on broadcasting indecent material"); *Pacifica*, 438 U.S. at 750 & n.28 (implying that prohibition of broadcasting indecent language would violate the First Amendment).

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[56](...continued)
so desire from purchasing the magazines for their children"); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (striking law as interfering with "the power of parents to control the education of their own"); *see also Pacifica*, 438 U.S. at 769-70 (Brennan, Marshall, JJ., dissenting); Pet. 59a-61a (Wald, J., dissenting).

Assuming, however, that the government has an independent interest in protecting children from non-obscene speech in those circumstances where parental control is likely to be structurally impracticable, cable television is decidedly not a context where such circumstances exist, and hence that additional interest cannot support restrictions on speech in this case beyond those supportable under the interest in enabling parents. Cable television is exclusively accessible in homes (there are no pay-cable sets on street corners), where it is an invited (and paid-for) guest. In sharp contrast to telephones, cable television is highly susceptible to parental control, as the family mailbox was found to be in *Bolger*, 463 U.S. at 73.

B. Section 10(b) Is Not Narrowly Tailored.

Assuming that §§ 10(a) and 10(c) are invalid and severable, the remaining portion of the regulatory framework — requiring the blocking of unprohibited "indecent" speech from only leased access channels, but not PEG channels or any other channels — also imposes burdens on speech that are neither necessary nor narrowly tailored to advance the government's goals.

1. Section 10(b) is impermissibly overinclusive, because its restrictions on speech do not advance the government's goals.

Section 10(b)'s blocking scheme is invalid for the same reason that the Son-of-Sam law was struck down: however laudable the goal to be served, the regulatory scheme is so carelessly constructed (and in such derogation of basic First Amendment principles) that it burdens substantial and valuable speech that need not be burdened to achieve its legitimate goals, and in any event imposes far greater burdens on speech than are necessary given available alternatives that are far less oppressive.

As in *Simon & Schuster*, 502 U.S. at 122, and *NTEU*, 115 S. Ct. at 1013, a substantial portion of the burden on speech does not serve to advance the government's content-neutral goal. *See* above at 7 & n.6. Instead of targeting speech that would be *harmful* to children, as in *Ginsberg v. New York*, 390 U.S. at 639, § 10's touchstone is any reference to sexual activity or body parts that operators might believe the "average cable subscriber" would consider "offensive," even if those materials undeniably have serious literary, artistic, scientific, or educational value. Offensiveness is surely not a proxy for harm. *See* above at 29. Regardless of whether the hypothetical "average cable subscriber" might consider Picasso's drawings, Shakespeare's double entendres, film of a Japanese village fertility festival, or an illustrated discussion of the importance of and techniques for breast self-examination to be offensive, such content is not harmful to all those under 18 (indeed, it is probably not harmful to any of them).

2. Section 10(b) imposes unnecessary burdens on speech.

Petitioners begin by identifying the burdens imposed by § 10(b), even in the absence of §§ 10(a) and 10(c), and then turn to the available alternatives that advance the relevant interests equally as well with far less restriction on First Amendment interests.

Section 10(b) requires suppression of speech unless viewers perform "an official act" as a prerequisite to receiving constitutionally protected programming. But, as this Court held in *Lamont v. Postmaster General*, 381 U.S. 301, 305 (1965), requiring "an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment rights" is unconstitutional. Requiring a written request — thereby placing one's name on a list of those desiring "bad" speech and exposing oneself to subpoena, leak, or gossip — is "an affirmative obligation which we do not think the Government may impose . . . [and] is almost certain to have a deterrent effect." *Id.* at 307; *see also Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm'n*, 896 F.2d 780, 785 (3d Cir. 1990) ("An identification requirement exerts an inhibitory effect, and such deterrence raises First Amendment issues comparable to those raised by direct state imposed burdens or restrictions") (citing *Talley v. California*, 362 U.S. 60, 64-65 (1960)).[57]

Blocking under 10(b) is indistinguishable from a total prohibition for viewers who, not yet having requested access, would have seen a (now-blocked) program while changing channels and decided to watch it. The same is true for every subscriber who promptly asks for access to a program she learns about — from a friend who calls and says "turn to channel 36," from a listing in a daily newspaper or weekly TV Guide, or from a community group telephone call or mailing — but will be denied because of the 30-day delay in unblocking. Advisories about such programs (which could prompt an unblocking request) are rarely available with more than 7 days notice, and virtually never with more than 30.

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[57] *See McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1516-17 (1994) (recognizing First Amendment and privacy interests served by anonymity).

Yet, in a sterile analysis at odds with this Court's First Amendment jurisprudence and *Lamont*, the court of appeals held that the practical loss of speech was of no constitutional concern, because speakers are not forbidden "from speaking" and viewers could have obtained all indecent speech had they previously sent in their postcards asking to be put on the "indecent speech" list. *Compare* Pet. 42a *with*, *e.g.*, *Lamont*, 381 U.S. at 306-07. Judge Wald's response is compelling.[58]

The blocking scheme is "almost certain to have a deterrent effect" on those who would otherwise seek to obtain the speech by requiring virtually any speech with a sexual reference to be "certified" with the denigrating term "indecent," authorizing operators to divert speech they "believe" to be "indecent" onto a channel for "indecent" speech, and prohibiting access except upon

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[58] [Many viewers] probably do not want to be perceived (even by their cable operator, much less anyone who might later acquire such information by subpoena or otherwise) as the kind of people who [want indecent speech]. They therefore will not affirmatively write for access . . . . Yet given a free choice in the matter, they might prefer to have unimpeded, selective access to some but not all programs that fall within that broad umbrella designation. Not only *aficionados* of the arts or of politics but also the mildly curious might well decide to watch an "unvarnished" documentary on the Mapplethorpe exhibit if it is readily available, for example, but may not write to request an entire channel of indecency on the chance that this and similar programs will be included. They may want to shield their children from most "indecent" programming, yet may occasionally find it appropriate to expose older children to frank, even graphic discussions of sexuality and the AIDS epidemic, including some programs that might fall within the FCC's definition of "indecency" (or at any rate are close enough to the line that cable operators will ban them altogether or relegate them to the "indecent" channel). Whether they are "channel surfers" who like to browse before settling on a program, or "appointment viewers" who prefer to study a program guide and watch preselected programs, this regulation [deprives viewers of speech that they would otherwise obtain].

Pet. 57a (Wald, J., dissenting).

a written request for the "indecent" channel.[59] *Lamont*, 381 U.S. at 307; *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 766-67 (1986).

The government entirely failed to show that *any* of these burdens was necessary, and the record and reason demonstrate that there are a number of available, less restrictive alternatives — including lockboxes already required by law, or the even less restrictive and equally effective blocking-on-request — by which the government could advance its legitimate interests.

Since 1984, Congress has mandated that cable operators provide a "lockbox" to every subscriber, 47 U.S.C. § 544(d)(2), having found during lengthy committee hearings and floor discussions that lockboxes are a very effective and efficient means of individually regulating what is viewable in one's own home, *e.g.*, H.R. REP. NO. 934, 98th Cong., 2d Sess. 70 (1984).[60] There is no demonstration in § 10's legislative history — indeed, there are no congressional findings as to § 10 at all — that lockboxes are no longer a sufficient means of meeting any asserted compelling governmental interest underlying § 10 or otherwise. Before the Commission, operators, programmers, and viewers noted without contradiction that lockboxes are an effective way of achieving the government's aims. *See* above at 7-8.

The court of appeals' contrary conclusion (Pet. 33a-36a) lacks any foundation in the record (or in anything before Congress) and applies a version of strict scrutiny so relaxed that it bears no semblance to the test that this Court deploys. *Compare Sable*, 492 U.S. at 128-129, and *id.* at 131 (Scalia, J., concurring) (available technological alternatives render statute invalid, even though some

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[59] The privacy provisions of 47 U.S.C. § 551 do not resolve these concerns, for they are entirely dependent upon cable operators and the penalties for violation thereof are minimal.

[60] Lockboxes allow a subscriber to block and unblock any channel at any time, generally by programming her lockbox and using a numerical code or mechanical lock that the subscriber controls. Pet. 36a; *see also* Lockbox Manuals, JA 95-100, 126-30, 147-51.

children "would manage to secure access") *with* Pet. 35a (lockbox alternative not effective because adults would have to "continually activate and deactivate their lockboxes, inevitably risking a slip up or a lapse"); *see also NTEU*, 115 S. Ct. at 1017 (individual determinations less restrictive than wholesale prophylactic rule).

Another obvious alternative that puts decision-making in the hands of parents instead of the state is reverse central blocking, under which an operator would block specific channels on a subscriber's request to do so. Blocking on subscriber *request* would be equally effective at facilitating parental protection of children and, with respect to each of the burdens imposed by § 10(b), far less restrictive than the present system. Notably, the telecommunications restructuring bill passed in the Senate and, at this writing, in conference recognizes the practicability of such a system, and would require scrambling "upon subscriber request."[61]

Further, there is no merit to the government's attempt to cure the absence of findings by the Commission or Congress regarding the necessity for § 10(b)'s blocking scheme by focussing on findings regarding a completely different medium, telephones.[62] This Court has repeatedly insisted that each medium of communication requires individual treatment, *e.g.*, *Pacifica*, 438 U.S. at 748, *Burstyn*, 343 U.S. at 503, and findings from one medium cannot simply be imported to another where the basic structures differ in important relevant respects. Here, it is self-evident that the telephone has highly relevant technological capabilities (and limitations) and practical configurations wholly different from cable. *See* Regulations Concerning Indecent Communications by Telephone, 5 FCC Rcd 4926 (1990).

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[61] S. 652, 104th Cong., 1st Sess. § 407 (1995); *see also* S. Con. 652, 104th Cong., 1st Sess. § 504 (draft of Dec. 17, 1995, 5:33 p.m.).

[62] In its opposition to the petitions for certiorari at 18, the government asserted that § 10(b) is "based on similar blocking requirements used to control children's access to dial-a-porn" and that "Congress *could* reasonably draw upon the knowledge gained in constructing that analogous legislation" (emphasis added).

For example, it is not technologically practical to use voluntary blocking for telephones because of the extremely large number of dial-a-porn numbers and the ease of creating or switching to new numbers. By contrast, lockboxes present a practical means of voluntary blocking on cable, because televisions are not available on street corners and cable operators only rarely reallocate channel numbers. *Cf. Bolger*, 463 U.S. at 73 ("We can reasonably assume that parents already exercise substantial control over the disposition of mail once it enters their mailboxes").

The government has not cited any evidence or congressional findings as to the necessity for automatic central blocking limited to leased access, such as it presented to the courts in the "dial-a-porn" cases, nor any findings that the situations are analogous. And the evidence is to the contrary. For these reasons — and because § 10 will effectively prohibit and deny adults and minors access to valuable speech that they would have otherwise accessed and have a right to receive, *id.*, whereas the effect of the dial-a-porn measures was entirely less restrictive for adults — the cases upholding the final version of the dial-a-porn regulations are inapposite here.

3. Section 10(b) is impermissibly underinclusive, because it blocks only speech by leased access programmers.

Finally, § 10(b) and its implementing regulations require the blocking of "indecent" speech on leased access channels, but not on PEG channels and not on the channels over which a cable operator has editorial discretion. Irrationally, even though a cable operator is *required* to block on a leased access channel a program that is identified as (or which it believes to be) "indecent," the operator is entirely free to cablecast that same program (or any other program with comparably "indecent" content) on any other cable channel. *See* above at 32 n.44. Of course, given the strong antipathy that many cable operators have for access programmers and their desire to exclude them from their systems,[63] the likelihood that blocking

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[63] *See, e.g.*, S. REP. NO. 92, 102d Cong., 1st Sess. 31 (1991) ("The cable operator is almost certain to have interests that clash with that of the

(continued...)

will be used to disadvantage leased access programmers, rather than to protect children, is substantial.

"One step at a time" is not a justification for content- or speaker-based distinctions where First Amendment rights are concerned, regardless of the en banc court's unsupported assertion to the contrary, Pet. 39a-40a. *See Minneapolis Star*, 460 U.S. at 585; *Arkansas Writers' Project*, 481 U.S. at 231-32. But even if it were, no factual predicate for such a justification has been demonstrated here, and none exists. Speech apparently within the "indecent" definition can be, and indeed is, cablecast across every portion of cable systems without legal restraint (and can be broadcast, as well, during the safe harbor hours).[64] Absent any demonstrated compelling necessity for blocking only access channels, § 10(b) violates the First Amendment.

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[63](...continued)
programmer seeking to use leased access channels . . . . For example, the operator may believe that the programmer might compete with programming that the [operator] owns or controls"); H.R. REP. NO. 934, 98th Cong., 2d Sess. 48 (1984) (access channels may "represent[] a social or political viewpoint that a cable operator does not wish to disseminate" and may "compete[] with a program service already being provided by that cable system"); *see also* Comments of DAETC, JA 202; NYNEX Tel. Cos., JA 377.

[64] *See Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir.), *pet. for cert. filed*, 64 U.S.L.W. 3271 (Sept. 26, 1995); New York Citizens Comm. for Responsible Media, JA 365-74; Schwartz Decl., JA 393.

CONCLUSION

For all the foregoing reasons, section 10 and its implementing regulations are unconstitutional and the judgment below should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

47 U.S.C. § 531
Cable channels for public, educational, or governmental use

(a) Authority to establish requirements with respect to designation or use of channel capacity

A franchising authority may establish requirements in a franchise with respect to the designation or use of channel capacity for public, educational, or governmental use only to the extent provided in this section.

(b) Authority to require designation for public, educational, or governmental use

A franchising authority may in its request for proposals require as part of a franchise, and may require as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title, that channel capacity be designated for public, educational, or governmental use, and channel capacity or institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this section.

* * *

(e) Editorial control by cable operator

Subject to section 544(d) of this title, a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity provided pursuant to this section.

* * *

Section 10(c) of the Cable Television Consumer Protection and Competition Act of 1992
Pub. L. No. 102-385, § 10(c), 106 Stat. 1486

Within 180 days following the date of the enactment of this Act [Oct. 5, 1992], the Federal Communications Commission shall promulgate such regulations as may be necessary to enable a cable operator of a cable system to prohibit the use, on such system, of any channel capacity of any public, educational, or governmental access facility for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct.[1]

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[1] In this appendix, italics indicate provisions added by Section 10.

47 U.S.C. § 532
Cable channels for commercial use

(a) Purpose

The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

(b) Designation of channel capacity for commercial use

(1) A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator in accordance with the following requirements:

(A) An operator of any cable system with 36 or more (but not more than 54) activated channels shall designate 10 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(B) An operator of any cable system with 55 or more (but not more than 100) activated channels shall designate 15 percent of such channels which are not otherwise required for use (or the use of which is not prohibited) by Federal law or regulation.

(C) An operator of any cable system with more than 100 activated channels shall designate 15 percent of all such channels.

(D) An operator of any cable system with fewer than 36 activated channels shall not be required to designate channel capacity for commercial use by persons unaffiliated with the operator, unless the cable system is required to provide such channel capacity under the terms of a franchise in effect on October 30, 1984.

(E) An operator of any cable system in operation on October 30, 1984, shall not be required to remove any service actually being provided on July 1, 1984, in order to comply with this section, but shall make channel capacity

available for commercial use as such capacity becomes available until such time as the cable operator is in full compliance with this section.

* * *

(5) For the purposes of this section, the term "commercial use" means the provision of video programming, whether or not for profit.

(6) Any channel capacity which has been designated for public, educational, or governmental use may not be considered as designated under this section for commercial use for purpose of this section.

(c) Use of channel capacity by unaffiliated persons; editorial control; restriction on service; rules on rates, terms, and conditions

(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) of this section for commercial use, the cable operator shall establish, consistent with the purpose of this section and with rules prescribed by the Commission under paragraph (4), the price, terms, and conditions of such use which are at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) A cable operator shall not exercise any editorial control over any video programming provided pursuant to this section, or in any other way consider the content of such programming, except that an operator may consider such content to the minimum extent necessary to establish a reasonable price for the commercial use of designated channel capacity by an unaffiliated person.

* * *

(h) Cable service unprotected by Constitution

Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority *or the cable operator* is obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is otherwise

unprotected by the Constitution of the United States. *This subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards.*

* * *

(j) Single channel access to indecent programming

(1) Within 120 days following October 5, 1992, the Commission shall promulgate regulations designed to limit the access of children to indecent programming, as defined by Commission regulations, and which cable operators have not voluntarily prohibited under subsection (h) by —

(A) requiring cable operators to place on a single channel all indecent programs, as identified by program providers, intended for carriage on channels designated for commercial use under this section;

(B) requiring cable operators to block such single channel unless the subscriber requests access to such channel in writing; and

(C) requiring programmers to inform cable operators if the program would be indecent as defined by Commission regulations.

(2) Cable operators shall comply with the regulations promulgated pursuant to paragraph (1).

47 U.S.C. § 544
Regulation of services, facilities, and equipment

* * *

(d) Cable service unprotected by Constitution; blockage of premium channel upon request

(1) Nothing in this subchapter shall be construed as prohibiting a franchising authority and a cable operator from specifying, in a franchise or renewal thereof, that certain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or are otherwise unprotected by the Constitution of the United States.

(2) In order to restrict the viewing of programming which is obscene or indecent, upon the request of a subscriber, a cable operator shall provide (by sale or lease) a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber.

* * *

47 U.S.C. § 558

Criminal and civil liability

Nothing in this subchapter shall be deemed to affect the criminal or civil liability of cable programmers or cable operators pursuant to the Federal, State, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws, except that cable operators shall not incur any such liability for any program carried on any channel designated for public, educational, governmental use or on any other channel obtained under section 532 of this title or under similar arrangements *unless the program involves obscene material*.

Supreme Court, U.S.
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Nos. 95-124 and 95-227

In the Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1486, authorizes operators of cable television systems to prohibit indecent programming on channels set aside for lease by unaffiliated third parties (leased access channels), as well as channels reserved for public, educational or governmental (PEG) use. In addition, with respect to the leased access channels, if a cable operator chooses not to prohibit indecent programming on those channels, the operator must place such programming on a separate channel and block access to that channel until the cable subscriber requests access in writing. The questions presented are:

1. Whether Congress violates the First Amendment by permitting—but not requiring or encouraging—cable operators to prohibit indecent programming on their leased access or PEG channels.

2. Whether Congress violates the First Amendment by requiring cable operators who choose not to ban indecent programming on their leased access channels to segregate and block such programming, permitting access only upon a subscriber's written request.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-124

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 95-227

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals *in banc* (Pet. App. 2a-88a)[1] is reported at 56 F.3d 105. The opinion of the panel (Pet. App. 90a-125a) is reported at 10 F.3d 812. The Federal Communications Commission's First Report and Order (Pet. App. 128a-177a) is reported at

[1] References to "Pet. App." are to the Appendix to the Petition in No. 95-124.

8 FCC Rcd 998, and its Second Report and Order (Pet. App. 178a-202a) is reported at 8 FCC Rcd 2638.

JURISDICTION

The judgment of the court of appeals *in banc* was entered on June 6, 1995. The petitions for a writ of certiorari were filed on July 21, 1995, and August 9, 1995, respectively, and were granted on November 13, 1995 (116 S. Ct. 471). The jurisdiction of this Court rests on 28 U.S.C. 1254(1). See 28 U.S.C. 2350(a).

STATEMENT

1. Federal law requires operators of cable television systems with more than 36 channels to set aside a certain number of channels for commercial lease by unaffiliated third parties (leased access channels), see 47 U.S.C. 532(b) (1988 & Supp. V 1993), and permits local franchise authorities to require operators to set aside certain channels for "public, educational, or governmental [PEG] use." 47 U.S.C. 531 (1988).

When Congress first enacted those provisions in the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984 Cable Act), it forbade cable operators from exercising editorial control over their PEG and leased access channels, see 47 U.S.C. 531(e), 532(c)(2) (1988), and provided that cable operators "shall not incur any * * * liability" under federal, state, and local obscenity laws for programs carried on such channels, 47 U.S.C. 558 (1988). As one method of addressing the problem of indecent cable programming, however, the 1984 Act required cable operators to "s[ell] or lease" lockboxes to subscribers who request them. 47 U.S.C. 544(d)(2) (1988). A lockbox is a device "by which the subscriber can prohibit viewing of a particular cable service during periods selected by that subscriber." 47 U.S.C. 544(d)(2)(A) (1988).

Congress revisited the question of indecent cable programming, particularly on leased access and PEG channels, as part of its comprehensive overhaul of cable television regulation in the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992 Cable Act). "The problem," Congress was informed, "is that cable companies are required by law to carry, on leased access channels, any and every program that comes along," including programs that include a wide variety of highly indecent material. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms) (describing leased access program in New York that "depicts men and women stripping completely nude," another featuring people performing oral sex, and a channel with advertisements promoting "incest, bestiality, [and] even rape"). See also *id.* at S648 (statement of Sen. Thurmond) (noting leased access channel with "numerous sex shows and X-rated previews of hard-core homosexual films" as well as channels with advertisements for phone lines letting listeners eavesdrop on acts of incest). Members of Congress were concerned that "early and sustained exposure" to such material can cause "significant physical, psychological, and social damage to a child." *Id.* at S649 (statement of Sen. Coats).

To protect against the harm to children and to return a measure of control to cable operators on leased access channels, Congress adopted Section 10(a) of the 1992 Cable Act, 106 Stat. 1486, which permits cable operators to enforce "a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. 532(h) (Supp. V 1993). The provision's sponsor, Senator Helms, emphasized that by giving "the cable operator the right to reject such material," Section 10(a) "doe[s] not require

the cable operators to do anything." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992).

Congress also adopted a provision requiring the Commission to promulgate regulations to limit the access of children to indecent programming on leased access channels. Section 10(b) of the 1992 Cable Act, 106 Stat. 1486, requires cable operators who permit the carriage of indecent programming on leased access channels to place the programming on a separate channel and to block a subscriber's access to that channel until the subscriber requests in writing that the channel be unblocked. See 47 U.S.C. 532(j) (Supp. V 1993). As Congress was informed, the segregation and blocking requirement was "precisely the same method" that it had used and the courts had approved to block access to indecent telephone messages (so-called "dial-a-porn"). 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) (statement of Sen. Helms). See *Dial Information Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1543 (2d Cir. 1991), cert. denied, 502 U.S. 1072 (1992); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 878 (9th Cir. 1991).

Moreover, the problem of indecent programming, Congress found, was not limited to leased access channels. PEG channels were also being used, for example, "to basically solicit prostitution through easily discernible shams such as escort services, fantasy parties, where live participants, through two-way conversation through the telephone, are soliciting illegal activities." 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Fowler). See also *id.* at S650 (statement of Sen. Wirth) (agreeing that public access "has * * * been abused"). Congress therefore adopted Section 10(c) of the 1992 Cable Act, 106 Stat. 1486, which requires the Commission to enable cable operators to prohibit the use of PEG channels "for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." 47 U.S.C. 531 note (Supp. V 1993). In this way, Congress permitted cable operators to "police their own systems, which they cannot

do now." 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992) (statement of Sen. Wirth). The PEG provision differs from the leased access provision, however, in that it contains no requirement that operators segregate and block any indecent programming that they choose to carry.

Finally, Congress eliminated the immunity of cable operators for carrying obscene programming on their access channels, by specifying that operators would be free from liability for programming on leased access and PEG channels "unless the program involves obscene material." 1992 Cable Act, § 10(d), 106 Stat. 1486, 47 U.S.C. 558 (Supp. V 1993). The provision's sponsor explained that "it was never the intent of the Congress * * * to provide a safe harbor for obscenity." 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992) (statement of Sen. Helms).

2. The Commission adopted final regulations implementing the statutory provisions governing leased access channels in its *First Report and Order*, 8 FCC Rcd 998 (Pet. App. 128a-177a). In doing so, the Commission rejected constitutional challenges to Section 10(a)'s authorization to cable operators to prohibit indecent programming on leased access channels. Pet. App. 140a. The Commission also made clear that, consistent with the definition contained in Section 10(a) of the statute (itself based on the Commission's long-standing formulation), indecent programming subject to blocking consists of "programming that describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); Pet. App. 148a-149a.

The Commission issued regulations concerning the carriage of indecent programming on PEG channels in its *Second Report and Order*, 8 FCC Rcd 2638 (Pet. App. 178a-202a). The agency again rejected the contention that, by permitting operators to choose to prohibit certain programming on PEG channels, the statute violated

the First Amendment. Pet. App. 181a-183a. The Commission also construed the statute's coverage of programming containing "sexually explicit conduct" to mean that the programming must be "indecent." *Id.* at 186a-187a. The Commission found such a construction to be reasonable, "given the purposes underlying section 10 as a whole and its legislative history, namely, reducing the exposure of viewers, especially children, to 'indecent' programming on cable access channels." *Id.* at 187a.

3. Petitioners, a number of cable programmers and organizations of listeners and viewers, filed petitions for review of the Commission's orders in the court of appeals, contending that Section 10 and its implementing regulations violate their rights to free speech under the First Amendment.

a. After staying the regulations pending review, a panel of the court invalidated Sections 10(a) and 10(c). Pet. App. 111a. The panel held that, because those provisions permitted cable operators to ban indecent leased access and PEG programming, the operators' decisions to do so should be attributed to the federal government as "state action." *Id.* at 108a. The panel remanded the issue of the constitutionality of Section 10(b)'s segregation and blocking scheme for leased access channels to the Commission for further consideration in light of its invalidation of Sections 10(a) and 10(c). *Id.* at 122a-125a.

b. The court of appeals subsequently vacated the panel opinion, reheard the case *in banc*, and issued a judgment upholding Section 10 and the regulations. Pet. App. 2a-89a. The full court held that the decisions by cable operators to prohibit indecent leased access or PEG programming are not "state action" to which the First Amendment applies. *Id.* at 31a. The court emphasized that the statute does not "command" cable operators to prohibit indecent programming. *Id.* at 12a. Instead, the court explained, the statute "gives them a choice" (*id.* at 18a); operators "may carry indecent programs on their access channels, or they may not" (*id.* at 12a).

As the court explained, that is the same choice that operators have with respect to all other cable channels on their systems. *Id.* at 14a.

The court also concluded that the statute does not provide such "significant encouragement" to the decision by any cable operator to ban indecent access programming that "state action must be found." Pet. App. 19a. As the court recognized, "'[m]ere approval of or acquiescence in the initiatives of a private party' * * * cannot 'justify holding the State responsible for those initiatives.'" *Id.* at 22a (quoting *Blum* v. *Yaretsky*, 457 U.S. 991, 1004-1005 (1982)). The court also found that it would be inappropriate to assume that the costs associated with Section 10(b)'s segregation and blocking scheme would cause cable operators to ban indecency from their leased access channels. Pet. App. 23a-25a. As the court explained, "[n]othing in section 10 specifies that [such costs] * * * must be borne by cable operators," and the FCC "has determined to take up this and related issues in its cable rate regulation proceeding upon the final resolution of this litigation." *Id.* at 24a.

In addition, the court determined, any effect that Section 10(d)'s removal of immunity for the carriage of obscene programming would have on an operator's programming decision would not support attribution of the operator's decision to ban indecent programming to the government. Pet. App. 26a-27a. The court observed that because obscene cable programming is constitutionally unprotected, Congress has the power to ban such programming altogether. The court noted that "Section 10(d) thus imposes on cable operators the same liability for obscene access programming that operators long have had with respect to other programming on channels they control." *Id.* at 27a. If "a cable operator takes this into account in deciding which programs to carry—on any channel," that fact could not "convert its refusal to carry indecent programming into state action." *Ibid.*

The court determined, moreover, that leased access and PEG channels are not "public forums" for First Amendment purposes, since they are neither owned by the government, Pet. App. 29a, nor "so dedicated to the public that the First Amendment confers a right on the users to be free from any control by the owner of the cable system," *id.* at 31a. The court found that the 1992 Cable Act's leased access and PEG obligations are akin to common carrier requirements, which have never been thought to transform a private entity's decisions into those of the government. *Ibid.*

The court held that Section 10(b)'s segregation and blocking scheme constitutes state action, but is the least restrictive means of accommodating "two competing interests: the interest in limiting children's exposure to indecency and the interest of adults in having access to such material." Pet. App. 33a. The voluntary use of lockboxes would not be an effective alternative, the court determined, since it would present cable viewers with "two, equally unacceptable options." *Id.* at 35a. Because such channels are controlled by no single editor, viewers either would have to "continually activate and deactivate" the lockboxes, "inevitably risking a slip up or a lapse that would expose their children to indecency," or they would have to "install lockboxes permanently, thereby giving up leased access programming altogether." *Ibid.*

The court rejected petitioners' arguments that Section 10 unconstitutionally discriminates against leased access programming because it does not impose a similar segregation and blocking scheme on PEG or commercial cable channels. The court explained that leased access channels are unlike commercial channels, not only because no single editor is responsible for what is shown on leased access channels, but because indecency on other channels is generally shown only upon request and for a premium payment. Pet. App. 40a-41a. The court acknowledged that PEG channels "are comparable" to leased access channels in this respect, but found that PEG

channels "did not pose dangers on the order of magnitude of those identified on leased access channels." *Id.* at 40a.

Finally, the court concluded, the statute's indecency standard is not impermissibly vague, noting that the standard tracks the Commission's generic definition of indecency, which this Court reviewed and upheld in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978). Pet. App. 42a-43a.[2]

SUMMARY OF ARGUMENT

I. Cable operators "own the physical cable network and transmit the cable signal to the viewer." *Turner Broadcasting Sys., Inc.* v. *FCC*, 114 S. Ct. 2445, 2452 (1994). By virtue of its ownership interest, a cable operator ordinarily exerts editorial control over the programming provided on its system; it chooses which programs it will transmit, and which it will not. See *id.* at 2456; *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986); *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

In requiring that certain channels be set aside for leased access programming and permitting cable operators and local franchise authorities to agree to reserve other channels for PEG programming, Congress generally withdrew the operators' editorial control over those portions of their systems. See 47 U.S.C. 531(e), 532(c)(2) (1988). By doing so, however, Congress removed the ability of operators to determine whether or not to carry indecent programming on their systems. Sections 10(a) and 10(c) of the 1992 Cable Act simply restore that abil-

[2] Only Judges Wald and Tatel dissented in full from the *in banc* decision. Pet. App. 44a-76a. Judge Edwards stated that in his view Sections 10(a) and 10(b), read in tandem, impose an unconstitutional burden on speech, but he sided with the majority as to Section 10(c), concluding that the provision "merely returns some editorial control to cable operators," which is "not the least bit objectionable." *Id.* at 78a. Judge Rogers agreed with the dissenters only with regard to Section 10(b); after severing that provision, she would have upheld the rest of the statute. *Id.* at 88a.

ity by permitting operators, if they so choose, to prohibit indecent programming on their leased access and PEG channels.

Sections 10(a) and 10(c) do not provide governmental encouragement to cable operators not to broadcast indecent programming, let alone so significantly encourage them not to do so that the operators' decisions should be attributed to the government. Sections 10(a) and 10(c) leave the decision whether or not to carry indecent access programming entirely up to each cable operator; the statute neither requires operators to ban such programming nor provides them with significant incentives to do so. The fact that Sections 10(a) and 10(c), like many other federal statutes, preempt state laws to the contrary does not require attribution of the cable operators' decision to the government under the state action doctrine. Nor are private cable operators bound by the public forum doctrine to carry whatever programming is submitted to them for dissemination on access channels.

Although the programming decisions of private cable operators are not properly attributed to the government, Congress's enactment of a law giving them that choice must be consistent with the First Amendment. That law, however, does not restrict the right of the public to engage in free expression. Instead, it permits private cable operators to exercise their own expressive rights by refusing to serve as disseminators of indecent programming. The government's allowance of that freedom of private choice, in the context of indecent speech, is both reasonable and viewpoint-neutral. Accordingly, Sections 10(a) and 10(c) are consistent with the First Amendment.

II. The 1992 Cable Act also requires, through Section 10(b), that cable operators who carry indecent programming on leased access channels must segregate and block such programming on a separate channel, with access available upon a subscriber's written request. 47 U.S.C. 532(j) (Supp. V 1993). Section 10(b) constitutes state action.

The First Amendment does not require that regulations of indecency on television be subject to the strictest standard of review. Like radio broadcasting, which this Court addressed in *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978), television is a uniquely pervasive presence in American homes, and its offerings are uniquely accessible to children. Therefore, the conclusion in *Pacifica* that a more flexible standard of review applies to regulation of indecency broadcast over the radio is equally appropriate to regulation of indecency on cable television.

In any event, Section 10(b) would satisfy even strict scrutiny, because it constitutes the least restrictive means of realizing the federal government's "compelling interest in protecting the physical and psychological well-being of minors." *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 126 (1989). As Congress was informed, programming carried on access channels included footage of sexual intercourse, advertisements for dial-a-porn services, "escort" solicitations, and other sexually graphic material. See, *e.g.*, 138 Cong. Rec. S646-S648 (daily ed. Jan. 30, 1992). Under the 1984 Cable Act, children had unimpeded access to such programming unless and until their parents discovered that their family televisions harbored indecent images that they never ordered, spent the time and money to buy a "lockbox" from their cable operators, and accurately installed and programmed the lockbox to screen what their children could view. Recognizing that inertia or lack of knowledge would keep many parents from taking those steps, Congress found that a segregation and blocking requirement was as a practical matter necessary to limit the access of children to indecent programming.

III. Finally, Congress's limitation of segregation and blocking to leased access channels does not render Section 10(b) impermissibly underinclusive. As the court of appeals determined, Congress reasonably found that the problem of indecency was more severe on leased access than on other channels. Nor is Section 10 unconstitutionally vague because it applies to "programming

that describes or depicts sexual or excretory activities or organs in a patently offensive manner." 47 C.F.R. 76.701(g). As this Court implicitly determined in *Pacifica*, that formulation, as it has been applied by the Commission, is not "so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application." *Action for Children's Television* v. *FCC*, 852 F.2d 1332, 1338-1339 (D.C. Cir. 1988) (internal quotation marks omitted).

ARGUMENT

I. SECTIONS 10(a) AND 10(c) OF THE 1992 CABLE ACT, WHICH PERMIT CABLE OPERATORS TO PROHIBIT INDECENT PROGRAMMING ON LEASED ACCESS AND PEG CHANNELS, DO NOT VIOLATE THE FIRST AMENDMENT

In seeking to invalidate Sections 10(a) and 10(c), petitioners make two distinct arguments. First, they argue (DAETC Br. i (Questions Presented), 14-15 & n.17, Alliance Br. 29) that those provisions are unconstitutional because private cable operators will "censor" the speech of access programmers. Although they claim otherwise (see DAETC Br. 19, Alliance Br. 22), that argument amounts to a mistaken claim that private cable operators are state actors when they make individual programming decisions. The action of private operators in choosing whether to prohibit indecent programming on access channels on their own systems is not properly attributable to the federal government.

Second, petitioners argue (DAETC Br. 19-21; Alliance Br. 20-22) that, because they are challenging a statute enacted by Congress, state action must be present. The enactment and governmental implementation of the statute are undoubtedly state action. Such action is not, however, "censorship." Instead, it is a grant of permission to private actors to make a choice regarding whether to transmit indecent material over their cable channels. Because the First Amendment allows the government to grant such permission, the statute is constitutional.

A. The 1992 Cable Act Does Not So Significantly Encourage Cable Operators To Prohibit Indecent Programming On Access Channels That Their Decision To Do So Should Be Attributed To The Government

By its terms, Section 10(a) of the 1992 Cable Act "permit[s]" cable operators to enforce a written and published policy of prohibiting indecent programming on leased access channels. 47 U.S.C. 532(h) (Supp. V 1993). It does not require them to do so. Section 10(c) of the 1992 Cable Act similarly requires the Commission to "enable" cable operators to prohibit the use of PEG channels for indecent programming, but it does not mandate that cable operators forbid such programming. See 47 U.S.C. 531 note (Supp. V 1993). Thus, as the court of appeals recognized, "[r]ather than coerce cable operators, section 10 gives them a choice." Pet. App. 18a. "Cable operators may carry indecent programs on their access channels, or they may not." *Id.* at 12a.

A governmental entity "normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [government]." *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 546 (1987) (quoting *Blum*, 457 U.S. at 1004). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient." *Blum*, 457 U.S. at 1004. Accord *San Francisco Arts & Athletics*, 483 U.S. at 547. Because nothing in Section 10 compels cable operators to prohibit indecent programming on leased access or PEG channels or significantly encourages operators to do so, their private choice is not attributable to the government.

1. Petitioners contend that the statute significantly encourages operators to ban indecent access programming

because Members of Congress, such as Senator Helms, voiced their expectation that the statute would "put an end to the kind of things going on in New York and elsewhere" on access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992); see Alliance Br. 28-29. As the court of appeals recognized (Pet. App. 21a-22a), the fact that individual Members of Congress may have expressed hope that operators would prohibit indecent programming on their access channels is of little relevance. Such statements impose no legal duty on cable operators, and may not even come to their attention. The question, instead, is whether *the statute* coerces or otherwise significantly encourages operators to prohibit such programming. See *Blum*, 457 U.S. at 1004-1005. If it does not, decisions by cable operators to prohibit indecent programming cannot be attributed to the government, whatever the statements of individual legislators.

In any event, Senator Helms' statement was made not with regard to Section 10(a) or Section 10(c), but with regard to Section 10(*d*), which removed cable operators' immunity for obscene programming, and was meant to emphasize that federal law would no longer provide a "safe harbor for obscenity" on access channels. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992). The statement has no relevance whatever to Senator Helms' separate discussion of Section 10(a), which, he emphasized, "does not require cable operators to do anything." *Id.* at S646.[3] Other supporters of Sections 10(a) and 10(c) also understood and confirmed the limited effect of those provisions. For example, Senator Thurmond observed that Section 10(a) "gives cable operators the right to reject sexually explicit programming on leased * * * access

[3] Senator Helms underscored the voluntariness of the cable operator's decision in a colloquy with Senator Inouye, the Democratic manager of the bill. Senator Inouye asked: "The action proposed in your amendment is not mandatory, is it?" 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992). To which Senator Helms responded: "That is correct." *Ibid.*

channels," but that operators could "choose to accept such programming." *Id.* at S648. Senator Fowler, who introduced Section 10(c) on the Senate floor, explained that Section 10(c) "would *empower* cable operators to prohibit sexually explicit conduct * * * carried through the so-called public access channels." *Id.* at S649 (emphasis added). And Senator Wirth similarly emphasized that Section 10(c) would "give a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now." *Id.* at S650. Those statements by the principal supporters of Sections 10(a) and 10(c) reflect an intent to leave it entirely up to cable operators to decide whether or not to ban indecent access programming.

2. The Alliance petitioners contend (Br. 29-30) that the 1992 Cable Act encourages cable operators to prohibit indecent programming on their leased access and PEG channels, focusing on Section 10(d)'s removal of operators' immunity for the carriage of access programming that "involves obscene material." 47 U.S.C. 558 (Supp. V 1993). It is well settled, however, that the government may prohibit obscene speech, since such speech falls outside the First Amendment.[4] See, *e.g.*, *Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 124 (1989). The fact that cable operators are now subject to such prohibitions with respect to their access channels—as they previously were with respect to all other channels they operate—does not provide a special incentive to operators to ban indecent programming that is not obscene.

Alliance nonetheless maintains (Br. 30) that, in order to avoid liability for carrying obscene speech, cable operators are likely to "take the safe route and simply ban all materials that access programmers cannot affirmatively certify to be decent." But "[s]ome self-censorship is an

[4] The FCC has made clear that the statutory phrase removes operator immunity only for material that "is unprotected by the first amendment." Pet. App. 152a n.40.

inevitable result of all obscenity laws." *Carlin Communications, Inc.* v. *Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1297 n.6 (9th Cir. 1987), cert. denied, 485 U.S. 1029 (1988). See *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46, 60 (1989). Private parties make private decisions against a backdrop of criminal laws and obscenity statutes every day. As the court of appeals recognized (Pet. App. 27a), the fact that they take such laws into account does not transform their decisions into those of the government. *Carlin*, 827 F.2d at 1297 n.6.

3. Alliance also alleges (Br. 29) that cable operators have an incentive under the statute to ban rather than block indecent access programming because "blocked channels are technically cumbersome and financially burdensome."

As the court of appeals recognized, a blocked channel is not "technically * * * cumbersome" to establish; "[e]very cable system that has premium or pay-per-view channels already is constantly blocking and unblocking them and thus has the technical capability to perform this task." Pet. App. 24a, 25a. For those systems that do not have such channels, the Commission's rules permit the operator to achieve the same result by installing lockboxes that exclude the blocked channel, while retaining the key or numeric code until the customer requests unblocking. *Id.* at 25a (citing *id.* at 162a n.46).[5] In any event, even if there were some cable systems for which the blocking requirement posed technical difficulties, that fact cannot assist petitioners in this facial, pre-enforcement challenge to the statute as a whole. See *Reno* v. *Flores*, 113 S. Ct. 1439, 1446 (1993).

Any financial burdens relating to the establishment of a separate blocked channel are irrelevant to petitioners'

[5] Operators also are not required to block a separate channel for the entire day if only a few hours are needed to carry indecent programming. Under the Commission's rules, the channel designated for the carriage of indecent leased access programming need "be blocked only during those time periods that indecent leased access programming is being shown." Pet. App. 163a.

facial challenge to Section 10's constitutionality. As the court of appeals recognized, the statute does not require that costs associated with segregation and blocking of indecent programming on leased access channels be borne by the cable operator, and the Commission has yet to consider the matter. Pet. App. 24a, 146a n.29.

The record also suggests that carrying indecent programming provides cable operators with financial benefits that offset whatever burden might be involved in implementing Section 10(b)'s blocking requirements. Indecent programming is often highly popular, as petitioners are aware. See Alliance Br. 43 n.33 (noting that by mid-1992, the Playboy Channel had generated more than $50 million" in revenues for cable operators). Indeed, Time Warner—a large cable operator that "owns and operates cable systems in approximately 1,000 franchise areas throughout the United States," J.A. 251—successfully suggested to the Commission that a cable operator should be allowed "to provide an additional blocked leased access channel for indecent programming if the first channel becomes full." See Pet. App. 163a; J.A. 255-256. See also J.A. 251-252 (noting that leased access channel in New York City is "usually fully booked with sexually explicit programming" every day "from 10:00 p.m. to 4:30 a.m." and that "the demand for additional time remains high").

Nor is there reason to believe that cable operators' "general hostility" towards access programmers (see Alliance Br. 29) will lead operators to ban indecent programming on their access channels. An operator's decision to prohibit indecent programming on access channels does not generally lessen its obligation to provide such channels; it simply changes the mix of its access programming. Thus, the fact that operators may be generally reluctant to provide access capacity does not suggest that, once obligated to provide a set number of access channels, see 47 U.S.C. 532(b) (1988 & Supp. V 1993), they will be more or less likely to permit indecent access programming.

4. a. Relying on *Railway Employes' Dep't* v. *Hanson*, 351 U.S. 225 (1956), petitioners contend (Alliance Br. 24-27; DAETC Br. 23-24) that the actions of the cable operators in deciding whether to ban indecent programming from their access channels should be attributed to the federal government because Section 10(a) and 10(c) preempt contrary state law.

Hanson involved a provision of the Railway Labor Act authorizing interstate railroads to enter into union shop agreements "[n]otwithstanding any * * * law * * * of any State." 45 U.S.C. 152, Eleventh.[6] Appellees, non-union employees of a railroad that had entered into a union shop agreement, sought to enjoin the application and enforcement of the agreement under state law. *Hanson*, 351 U.S. at 228. The Supreme Court of Nebraska held that the union shop agreement violated the First and Fifth Amendments, and that therefore Nebraska law, which prohibited the agreement, was controlling. *Id.* at 230. On appeal, this Court concluded that the federal statute constituted state action to which the First and Fifth Amendments applied. *Id.* at 232.

Hanson provides no support to petitioners' argument here. First, the preemptive effects of Sections 10(a) and 10(c) are not appropriately resolved in this facial challenge to Section 10. To prevail, petitioners "must establish that no set of circumstances exists under which the [statute] would be valid." *Reno* v. *Flores*, 113 S. Ct. at 1446. Yet petitioners do not—and could not—assert that every cable operator is required by state or local law or by a franchise agreement to permit indecency on access channels. Alliance cites (Br. 26 n.18) only two jurisdictions (New York and the Virgin Islands) that divest cable operators of editorial control over their leased and public access channels as a matter of local law. And

[6] A union shop agreement provides that "an employee must become a member of the union within a specified period of time after hire, and must as a member pay whatever union dues and fees are uniformly required." *Abood* v. *Detroit Bd. of Educ.*, 431 U.S. 209, 217 n.10 (1977).

it is not uncommon for local access regulations to prohibit indecent programming, notwithstanding the fact that the 1984 Cable Act would appear to have prohibited such requirements. See Comment, *Controversial Programming on Cable Television's Public Access Channels: The Limits of Governmental Response*, 38 DePaul L. Rev. 1051, 1084 n.225 (1989) (citing regulations). Moreover, insofar as ordinances or contracts preclude cable operators from exercising editorial control over access channels, those ordinances and contracts may well have been influenced by the like requirement in the 1984 Cable Act itself; by preempting such provisions, Congress has to a great extent returned the parties to the position they would have occupied had the 1984 Cable Act itself been limited.

In any event, even if federal preemption in some circumstances can make the actions of a private party attributable to the federal government, that surely is not the case whenever federal law preempts state law. For example, the federal allocation of broadcast frequencies no doubt preempts any state effort to accomplish the same end; that fact does not, however, convert the editorial choices of federal broadcast licensees into state action. Cf. *CBS, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973). Similarly, the Equal Access Act, 20 U.S.C. 4071(a)—which requires the States in some circumstances to permit private religious activities on public school property, see *Board of Educ.* v. *Mergens*, 496 U.S. 226 (1990)—does not somehow transform a private religious group's doctrinal instruction into proselytization by the government itself in violation of the Establishment Clause. See *Garnett* v. *Renton School Dist. No. 403*, 987 F.2d 641, 646 (9th Cir.) (discussing Act's preemptive effect), cert. denied, 114 S. Ct. 72 (1993). Accordingly, insofar as petitioners seek to rely on the preemptive effects of Sections 10(a) and 10(c), they should raise that issue as did the plaintiffs in *Hanson*, in an as-applied challenge to the statute based on alleged rights that they have under a particular state law.

Second, although we have previously argued that the holding of *Hanson* should not be extended to areas outside the context in which it was decided,[7] for present purposes it suffices that the holding in *Hanson* is entirely consistent with our position in this case. The holding of *Hanson* was that a federal statute permitting railroads and unions to negotiate union shop agreements that would be banned by contrary state law is government action and is constitutional. Similarly, although the conduct of cable operators in prohibiting indecent programming under Sections 10(a) and 10(c) is not properly attributable to the federal government, the statutory grant of permissive authority to cable operators to do so must be consistent with the First Amendment, and we argue below that it is. See pp. 24-28, *infra*. *Hanson* does not rest on the premise that a private employer's decision to enter into and enforce a union shop agreement is itself attributable to the government, and it therefore does not support petitioners' suggestion that, by analogy, Sections 10(a) and 10(c) convert the decisions of private cable operators to prohibit (or not to prohibit) indecent access programming into actions of the federal government. Private action is not attributable to the government merely because it is permitted by federal law. See *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164-166 (1978).

b. Contrary to petitioners' suggestion (Alliance Br. 28-31; DAETC Br. 24), this Court's decision in *Skinner*

[7] See Brief for the United States as Amicus Curiae at 24-30, *Communications Workers* v. *Beck*, 487 U.S. 735 (1988) (No. 86-637). This Court's cases that have discussed *Hanson* have not themselves had to address whether state action was present. *Abood* v. *Detroit Bd. of Educ.*, *supra*, involved public sector workers, and there was thus no state action issue in that case. 431 U.S. at 217-220. *Beck* involved a private-sector labor agreement, and the decision in that case turned on the interpretation of the National Labor Relations Act, not the Constitution. The state action issue accordingly did not arise. See 487 U.S. at 761 ("We need not decide whether the exercise of rights permitted, though not compelled, by [the Act] involves state action.").

v. *Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), does not support their claim. In *Skinner*, the Court noted that, "[a]lthough the Fourth Amendment does not apply to a search or seizure * * * effected by a private party on his own initiative, the Amendment protects against such intrusions if the private party acted as an instrument or agent of the Government." *Id.* at 614. The Court then examined whether a railroad that conducted drug tests authorized—but not required—by federal regulations could be "deemed an agent or instrument of the Government for Fourth Amendment purposes," and concluded that it could. *Ibid.*

The federal regulations in *Skinner* preempted state law or private agreements to the contrary, see 489 U.S. at 615, like the provisions at issue in this case. But the federal regulations in *Skinner* took two significant additional steps as well. First, the regulations in *Skinner* "confer[red] upon the [government] the right to receive certain biological samples and test results procured by railroads" in drug tests. *Ibid.* Because the government thus had the legal right to the fruits of the railroads' search, the situation was comparable to one in which a government agent participated in the search itself. Second, the regulations in *Skinner* provided that "[a]n employee who refuses to submit to the [drug] tests must be withdrawn from [certain job activities]." *Ibid.* They therefore inserted federal coercive force into the otherwise consensual transaction between railroad and employee.

The Court in *Skinner* explained that no single factor was dispositive; instead, "specific features of the regulations combine[d] to convince [the Court] that the Government did more than adopt a passive position toward the underlying private conduct." 489 U.S. at 615. Unlike the regulations in *Skinner*, Sections 10(a) and 10(c) do not provide the government with any service or benefit as a result of any private choices to prohibit (or not to prohibit) indecent access programming, and no coercive governmental power is employed to enforce those choices of private cable operators. Accordingly, the "spe-

cific features of the regulations" in this case demonstrate that the conduct of the cable operators is not attributable to the government.

5. Petitioners also seek support (Alliance Br. 32-35; see DAETC Pet. 20 n.11; New York City Br. 10-22) from their characterization of private cable systems as "public forums." As the court of appeals correctly discerned (see Pet. App. 28a), the public forum doctrine derives from efforts to address the "issue of when the First Amendment gives an individual or group the right to engage in expressive activity on *government* property." *Cornelius* v. *NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 815 (1985) (Blackmun, J., dissenting) (emphasis added); see also *International Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 112 S. Ct. 2701, 2707 (1992).[8] The access channels in this case plainly are not government property—they "belong to private cable operators; are managed by them as part of their systems; and are among the products for which operators collect a fee from their subscribers." Pet. App. 29a.[9] In addi-

[8] The mere fact that "an instrumentality 'is used for the communication of ideas or information'" does not automatically make it a public forum, even when the instrumentality is publicly owned. *United States Postal Serv.* v. *Greenburgh Civic Ass'ns*, 453 U.S. 114, 130 n.6 (1981). A public forum for First Amendment purposes thus "is not, for instance, a bulletin board in a supermarket, devoted to the public's use, or a page in a newspaper reserved for readers to exchange messages, or a privately owned and operated computer network available to all those willing to pay the subscription fee." Pet. App. 28a. Nor was the advertising space made available on the public buses at issue in *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974), a public forum even though it was used for the communication of ideas. *Greenburgh Civic Ass'ns*, 453 U.S. at 130 n.6.

[9] Petitioners state that "this Court has expressly stated that public forum analysis may be applied to 'private property dedicated to public use.'" Alliance Br. 35 (quoting *Cornelius*, 473 U.S. at 801). But the Court in *Cornelius* cited no case law in support of that proposition, and the forum at issue in *Cornelius*—the Combined Federal Campaign—involved the use of government property by government employees. 473 U.S. at 790, 801. Thus, the forum clearly was not "private property dedicated to public use." Pet. App. 30a. And, as the court of appeals recognized (*id.* at 30a-31a), this Court, in declining to equate private shopping centers with public streets and parks, has characterized the dedication-of-private-property-to-public-use theory as "attenuated" and "by no means" constitutionally required. *Hudgens* v. *NLRB*, 424 U.S. 507, 519 (1976); *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, 569 (1972). While the First Amendment does not prohibit a legislative requirement that portions of such private property be made available in some circumstances for the exercise of free expression (*PruneYard Shopping Center* v. *Robins*, 447 U.S. 74 (1980)), that does not mean that the First Amendment itself imposes such a duty in the absence of a legislative requirement. Thus, the *PruneYard* situation may be what the Court had in mind in referring to "private property" in *Cornelius*.

tion, also unlike parks and streets and other genuine public forums, access channels are available only to those programmers unaffiliated with the cable operator, 47 U.S.C. 532(b) (1988 & Supp. V 1993), and PEG channels are set aside for "public, educational, or governmental" programming. 47 U.S.C. 531 (1988). Finally, at least with respect to leased access channels, cable operators charge a fee for their use.

As the Commission and the court of appeals concluded, access obligations are thus most accurately described as imposing a species of common carrier obligation on cable operators. Pet. App. 139a-140a; *id.* at 31a. See *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 701 (1979). And it is well settled in parallel situations that common carriers are not required to refrain from distinguishing between kinds of speech on the basis of content. See, *e.g.*, *Sable*, 492 U.S. at 133 (Scalia, J., concurring) ("[W]e do not hold that the Constitution requires public utilities to carry [indecent speech]."); *Information Providers' Coalition* v. *FCC*, 928 F.2d 866, 877 (9th Cir. 1991) ("A telephone carrier * * * may ban 'adult entertainment' from its network."); *Carlin Communications*, 827 F.2d at 1297 (car-

rier generally under no constitutional restraints in its policy of banning all "adult" programming from its network).[10]

B. The First Amendment Permits The Government To Allow Cable Operators To Choose Whether Or Not To Allow Indecent Access Programming

Although an individual cable operator's decision to provide or withhold indecent programming on access channels cannot itself be attributed to Congress, state action does inhere in Congress's enactment of a statute giving operators such editorial freedom. Congress's authorization of private editorial choice in Sections 10(a) and 10(c) is constitutionally permissible. This Court has stated that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment," *Turner*, 114 S. Ct. at 2470; see 47 U.S.C. 521(4). To further that purpose, Congress has required cable operators to maintain access channels. Congress also, however, has a very substantial interest in protecting the expressive rights of cable operators who do not want to become purveyors of patently offensive programming regarding sexual and excretory matters. Sections 10(a) and 10(c) represent Congress's effort to achieve both purposes. The First Amendment does not require Congress to sacrifice either of them in order to pursue the other.

1. Sections 10(a) and 10(c) differ from most content-based regulations that are challenged on First Amendment grounds, because Sections 10(a) and 10(c) are

[10] The Alliance petitioners suggest (Br. 18-19, 31-32) that state action is present because the FCC has a continuing role in the implementation of Section 10 by resolving disputes concerning the definition of indecency under the statute. But the government's role in ensuring that a cable operator's editorial choices do not violate access programmers' statutory guarantees does not make the government the source of those choices. Analogously, the government's role in ensuring that employers do not hire or fire employees in violation of the civil rights laws does not somehow convert an employer's hiring or dismissal decisions into state action.

not restrictions on the right of the public to engage in free expression. Instead, they permit private participants in the marketplace of ideas to avoid serving as conduits for the speech of other private participants in the same marketplace. Or, to put the same point another way, Sections 10(a) and 10(c) limit programmers' expressive activity only insofar as—and to precisely the same extent as—they expand that of the operators.[11] Cf. *Midwest Video*, 440 U.S. at 700; Pet. App. 15a.

In those narrow circumstances, the fact that Sections 10(a) and 10(c) distinguish among categories of speech based on content does not pose the same dangers that content-based regulation ordinarily does. Where, as here, a challenged regulation directed at restoring editorial freedom does not restrict the overall ability of the public to engage in free expression, the regulation should be upheld so long as it is reasonable and viewpoint-neutral. See, *e.g.*, *Rosenberger* v. *Rector & Visitors of Univ. of Virginia*, 115 S. Ct. 2510, 2517 (1995) (speech in "limited public" forum); *International Soc'y for Krishna Consciousness*, 112 S. Ct. at 2705-2706 (speech in non-public forums); *Burson* v. *Freeman*, 504 U.S. 191, 214 (1992) (Scalia, J., concurring in the judgment) (same); see also *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 390 (1992) (although viewpoint-based regulations of obscene speech are inherently unlawful, content-based distinctions may be permissible so long as "there is no realistic possibility that official suppression of ideas is afoot"); *id.* at 430 (Stevens, J., concurring in the judgment) ("[W]e have implicitly distinguished between restrictions on expression based on *subject matter* and restrictions based on *viewpoint*, indicating that the latter are particularly pernicious."); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 616 (1973).

[11] When analyzing Congress's authority to enact speech-related laws, this Court has found it relevant (though not dispositive) that a given regulation is necessary to mediate the competing speech rights of two sets of private parties. See, *e.g.*, *CBS, Inc.* v. *FCC*, 453 U.S. 367, 396-397 (1981).

Thus, there would be no constitutional impediment to a federal statute authorizing cable operators, at their discretion, to confine programming on access channels to coverage of politics and world events. Likewise, Congress could authorize cable operators not to permit the use of access channels for music or sports shows. In either case, Congress's grant of authority would be reasonable; in neither case would it "rais[e] the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace," *Turner*, 114 S. Ct. at 2458 (quoting *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991)), even though the statutes at issue would undeniably distinguish among kinds of speech on the basis of content.

The same is true of Sections 10(a) and 10(c). Those provisions are a reasonable means of permitting cable operators to control what they, as participants in the marketplace of ideas, must transmit to the public. In addition, they are viewpoint-neutral: What they single out for special treatment are not "viewpoints" (indecent speech could relate to a myriad of mutually inconsistent "viewpoints"), but the manner in which those viewpoints are presented. Cf. *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 743 n.18 (1978) (plurality opinion) (noting that "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content of serious communication" and that "[t]here are few, if any, thoughts that cannot be expressed by the use of less offensive language").

2. Reasonable, viewpoint-neutral regulation in this context is particularly unobjectionable where the subject of the regulation is indecent expression. This Court has invalidated laws that bar all access to indecent material, regardless of whether such measures are necessary to protect the welfare of children or the rights of third parties. See, *e.g.*, *Sable*, 492 U.S. at 126-129. But the Court also has consistently upheld other laws that, technically on the basis of "content," single out indecent speech for

special restrictions.[12] The Court has recognized that such material, whatever its contribution to the marketplace of ideas,[13] can present an almost visceral "assault" on the sensibilities of those who wish to avoid it. *Pacifica*, 438 U.S. at 749.[14] A publisher has a right to display nudity in the centerfold of magazines whose contents readers presumably know in advance, but he does not have the right to display the same nudity on a highway billboard.

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[12] See, *e.g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675 (1986); *Pacifica*, 438 U.S. at 749-750; *Ginsberg* v. *New York*, 390 U.S. 629 (1968); see also *Barnes* v. *Glen Theatre, Inc.*, 501 U.S. 560 (1991) (upholding enforcement of public indecency law to prohibit expressive nude dancing); *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) (upholding restrictive zoning scheme directed at adult movie theaters); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (similar); see generally *R.A.V.*, 505 U.S. at 429 (Stevens, J., concurring in the judgment).

[13] Some of this Court's opinions suggest that indecent expression contributes so little to the marketplace of ideas that it merits less constitutional protection than speech closer to the core of the First Amendment. See *Barnes*, 501 U.S. at 566 (plurality opinion) ("nude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so"); *Bethel*, 478 U.S. at 685; *Pacifica*, 438 U.S. at 743 (plurality opinion) (indecent expression "surely lie[s] at the periphery of First Amendment concern"); *Young*, 427 U.S. at 70-71 (plurality opinion) (because "society's interest in protecting [pornographic] expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate[,] * * * the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures"); cf. *FCC* v. *League of Women Voters*, 468 U.S. 364, 383 (1984) (restrictions on core political speech require "especially careful" review).

[14] Petitioners repeatedly and inaccurately characterize what is at issue here as speech that "touches on sex," DAETC Br. 12, the "works of artists such as Courbet or Rodin or Picasso," *id.* at 30, "discussions of relationships between and among the sexes," *id.* at 35, or "the word 'breast,'" Alliance Br. 47. See also DAETC Br. 42, 44. To the contrary, materials that have in fact been found to be indecent under the standard that would apply in this case are aptly characterized as assaulting the viewer or listener. See p. 46 n.25, *infra*.

Sections 10(a) and 10(c) embody that same principle. Unlike the flat indecency ban at issue in *Sable*, those provisions do not interfere with the right to communicate indecent expression through an unbroken chain of consenting private parties. Instead, Sections 10(a) and 10(c) preserve the right of cable operators to avoid becoming purveyors of indecent material on their own systems. The government's interest in preserving that right is no less vital than its corresponding interest in protecting the right of viewers to avoid unwanted exposure to indecent programming. Cf. *Turner*, 114 S. Ct. at 2456 (noting rights of cable operators as disseminators of speech). No one has an absolute right to convey such material to—or through—unwilling third parties.

II. SECTION 10(b), WHICH REQUIRES SUBSCRIBERS TO REQUEST INDECENT LEASED ACCESS PROGRAMMING BEFORE CABLE OPERATORS MAY PROVIDE IT TO THEM, IS CONSTITUTIONAL

Unlike Sections 10(a) and 10(c), which give operators a choice, Section 10(b) requires operators "to place on a single channel all [leased access] indecent programs" and "to block such single channel unless the subscriber requests access to such channel in writing." 47 U.S.C. 532(j)(1)(A) and (B) (Supp. V 1993). The segregation and blocking scheme required by the statute is thus plainly action attributable to the government that is subject to constitutional constraints. In our view, its constitutionality does not depend on the application of strict scrutiny, since a more lenient standard of review applies to regulations designed to protect children from indecent materials on television. Even if it were subject to strict scrutiny, however, it would be constitutional, because the interests in protecting children on which it is based are compelling and because it is narrowly tailored to advance those interests.

A. Section 10(b) Is Not Subject To Strict Scrutiny

1. In *Pacifica*, this Court addressed the FCC's authority to regulate indecent but non-obscene programming broadcast over the airwaves. The Court did not apply strict scrutiny, but a more lenient standard of review. See 438 U.S. at 748. In adopting that approach, the Court did not rely on the scarcity concerns that have supported more lenient treatment of content-based requirements that broadcasters provide programming in the public interest. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 388 (1969). Instead, the Court rested on two independent considerations that are equally relevant to cable television, which, like broadcasting, conveys highly diversified programming to a mass audience that does not specifically request each program.

First, as this Court noted, radio and television broadcasting "have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Pacifica*, 438 U.S. at 748.

That concern applies to regulation of indecency on cable television no less than to its regulation over the airwaves. Television confronts the viewer with a limitless variety of images—some welcome, some not—whether a particular television set is attached to a cable or to an antenna. To be sure, cable subscribers "invite" those images into their homes by connecting their sets to the cable provider's signals. Cf. *Cruz* v. *Ferre*, 755 F.2d 1415 (11th Cir. 1985). That "invitation" is indistinguishable, however, from the affirmative steps any viewer must take to "invite" broadcast signals into the home: *e.g.*, purchasing a television set, attaching an antenna, and adjusting the antenna and the television's tuning knob to pick up local broadcast programming. In this sense, television signals (whether cable or broadcast) never intrude into the home without being "invited" in. What

intrudes, and what *Pacifica* denies the most stringent level of constitutional protection, are the indecent images that confront a viewer as unwanted and unexpected components of a highly diversified programming package. Thus, as the court of appeals observed (Pet. App. 34a), "[a] cable subscriber no more asks for [indecent] programming than did the offended listener in *Pacifica* who turned on his radio."

No matter how indecent images enter the home, of course, any television viewer has the option of turning them off. As *Pacifica* held, however, that option does not affect the level of constitutional scrutiny. "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow. One may hang up on an indecent phone call, but that option does not give the caller a constitutional immunity or avoid a harm that has already taken place." 438 U.S. at 748-749; see also *id.* at 748 (because audience "constantly tun[es] in and out," prior warnings cannot "completely protect the * * * viewer from unexpected program content"); Pet. App. 34a.[15]

This Court also based its decision in *Pacifica* on the additional ground that radio and television are "uniquely accessible to children, even those too young to read." 438 U.S. at 749. Combined with the government's interests in protecting the "well-being of its youth" and in facilitating parental supervision, "[t]he ease with which children may obtain access to broadcast material * * *

[15] Cf. *Sable*, 492 U.S. at 127-128 (invalidating flat ban on dial-a-porn services because, "[u]nlike an unexpected outburst on a radio broadcast, the message received by one who places a call to a dial-a-porn service is not so invasive or surprising that it prevents an unwilling listener from avoiding exposure to it"); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983) (invalidating flat ban on mailing of unsolicited contraceptive advertisements in part because, unlike "uniquely pervasive" broadcast media, "[t]he receipt of mail is far less intrusive and uncontrollable") (emphasis omitted).

amply justif[ies] special treatment of indecent broadcasting." *Id.* at 749-750 (quoting *Ginsberg* v. *New York*, 390 U.S. 629, 640 (1968)). Again, this principle is no less applicable to cable television than to broadcast television. From a child's perspective, both the means and the effect of exposure to indecent programming are identical whether the signal reaches the family television set by air or by cable.[16]

Indeed, the application of different standards of review to the regulation of indecency on cable television and on broadcast television could lead to absurd results. A large majority of American households now subscribes to cable television (on which local broadcast stations are among the available channels). *Turner*, 114 S. Ct. at 2454. In most households, there is thus no practical difference, from the viewer's perspective, between programming carried over broadcast channels and programming carried on non-premium cable channels, such as leased access channels. It is constitutionally permissible to prohibit broadcasters from televising indecent material at times when large numbers of unsupervised children are likely to be in the audience. *Pacifica*, 438 U.S. at 748-750; *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (in banc), cert. denied, Nos. 95-509 & 95-520 (Jan. 8, 1996). If regulations governing indecent programming on cable systems are subject to a stricter standard that

[16] Because the *Pacifica* standard applies, petitioners' citation of cases concerning restrictions on the "content" of "controversial"—and non-indecent—speech disseminated through other media is unavailing. Alliance Br. 36-37; see also DAETC Br. 38-39. In case after case, this Court has upheld laws that, on the basis of "content," single out indecent speech for special restrictions narrowly tailored to protect children. See p. 26 n.12, *supra*. Moreover, *Pacifica* rests on the premise that the special characteristics of television and radio programming make indecency conveyed through those media subject to greater regulation than indecency in other media. 438 U.S. at 748. As *Pacifica* holds, such regulation is subject to a less exacting standard of review than speech restrictions that involve neither indecency, children, nor the intrusiveness and accessibility of television.

leads to a different result, then unsupervised children will only have to change the channel to view indecent material. That result would both undermine the broadcast indecency rules and make no sense as a practical matter. Accordingly, regulations governing indecent programming carried on leased access channels should be judged by the same standard applicable to indecent programming carried over broadcast channels. That standard should be the less stringent standard applied by this Court in *Pacifica*.

2. Petitioners err in arguing (Alliance Br. 20-21, 36-37; DAETC Br. 22, 38-39) that this Court determined in *Turner*, 114 S. Ct. at 2457, that strict scrutiny applies to all content-based regulation of cable television, and that that determination is fully applicable in the context of this case.

It has long been clear that, because "a less rigorous standard of First Amendment scrutiny [applies] to broadcast regulation," this Court's cases "permitted more intrusive regulation of broadcast speakers than of speakers in other media." *Turner*, 114 S. Ct. at 2456 (citing *Red Lion Broadcasting Co.* v. *FCC*, *supra*, and *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943)). The "justification for [that] distinct approach to broadcast regulation" was "the unique physical limitations of the broadcast medium"—in particular, "[t]he scarcity of broadcast frequencies" and "the inherent physical limitation on the number of speakers who may use the broadcast medium." *Turner*, 114 S. Ct. at 2456-2457. In *Turner*, this Court declined to extend the principle of more lenient scrutiny to laws imposing affirmative programming requirements on the cable industry, "because cable television does not suffer from the inherent limitations that characterize the broadcast medium." *Id.* at 2457.

The Court's ruling in *Turner* has nothing to do with the separate question whether the *Pacifica* doctrine applies to regulations of indecency on cable television. Unlike the *Red Lion* principle, which applies broadly to regulations compelling programming in the public interest, the *Pacifica*

doctrine applies narrowly to regulations restricting indecent programming. Moreover, the Court's opinion in *Pacifica* rests its conclusions regarding the less rigorous standard of review entirely on the intrusiveness of radio and television and their unique accessibility to children—factors that the Court in *Turner* had no occasion to mention or discuss—rather than the scarcity rationale that the Court in *Turner* did discuss and found inapplicable to cable. Indeed, the Court in *Turner* left room for the continued application of the *Pacifica* approach to cable television, stating that "the First Amendment, *subject only to narrow and well-understood exceptions*, does not countenance governmental control over the content of messages expressed by private individuals." 114 S. Ct. at 2458 (emphasis added). Because the *Pacifica* doctrine provides one of those exceptions, this Court's opinion in *Turner* does not cast doubt on its continued application to cable television.

B. Section 10(b) Is A Constitutional Means Of Realizing The Government's Compelling Interest In Protecting The Well-Being Of Children

1. This Court has often affirmed that the government has a "compelling interest in protecting the physical and psychological well-being of minors," an interest that "extends to shielding minors from the influence of [indecent expression] that is not obscene by adult standards." *Sable*, 492 U.S. at 126 (citing *Ginsberg*, 390 U.S. at 639-640, and *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982)); see also *Sable*, 492 U.S. at 131; *Bethel School Dist. No. 403* v. *Fraser*, 478 U.S. 675, 683-684 (1986); *Pacifica*, 438 U.S. at 749-750. There are two aspects to that interest, either of which, standing alone, justifies reasonable government regulation of indecent speech. First, the government has an interest in helping parents exercise "authority in their own household to direct the rearing of their children." *Ginsberg*, 390 U.S. at 639; *Action for Children's Television* v. *FCC*, 58 F.3d at 661. Second,

quite apart from facilitating parental supervision, the government has an "independent interest in the well-being of its youth." *Ginsberg*, 390 U.S. at 640; see also *Sable*, 492 U.S. at 126; *Ferber*, 458 U.S. at 756-757; *Pacifica*, 438 U.S. at 749-750; *Prince* v. *Massachusetts*, 321 U.S. 158, 165 (1944).

The government's interest in shielding children from indecency on leased access channels is no less vital than its interest in shielding them from indecent messages conveyed over phone-sex lines, see *Sable*, 492 U.S. at 126, in school assemblies, see *Bethel School Dist.*, 478 U.S. at 683-684, through the airwaves, see *Pacifica*, 438 U.S. at 749-750, or in pornographic magazines, see *Ginsberg*, 390 U.S. at 639-640. In each case, the harm that the government seeks to foreclose—a child's exposure to patently offensive depictions of sexual and excretory activities—is exactly the same. As this Court has recognized, premature and repeated exposure to such material can "seriously damag[e]" a child's development, particularly the development of younger children "on the threshold of awareness of human sexuality." *Bethel School Dist.*, 478 U.S. at 683-684; accord 138 Cong. Rec. S649 (daily ed. Jan. 30, 1992) (statement of Sen. Coats) ("It is no secret that early and sustained exposure to hard core pornography can result in significant physical, psychological, and social damage to a child."); see also *Sable*, 492 U.S. at 126; *Pacifica*, 438 U.S. at 749-750. Notably, petitioners do not contend otherwise. See, *e.g.*, Alliance Br. 37.

2. Section 10(b) is also the least restrictive means of ensuring that children do not watch indecent programming on leased access channels without their parents' consent. Unlike the statute at issue in *Sable*, which denied adults as well as children any opportunity whatsoever to obtain access to indecent "dial-a-porn" messages, see *Sable*, 492 U.S. at 127,[17] Section 10(b) permits adults to watch whatever indecent programs they wish, whenever they wish, on leased access channels.

[17] See also *Bolger*, 463 U.S. at 73 (invalidating federal statute that categorically banned unsolicited mailing of contraceptive advertisements without giving those who wished to read such advertisements any effective way to receive them). As this Court emphasized in each case, both *Sable* and *Bolger* are also distinguishable because dial-a-porn services and mailed advertisements are less intrusive and less accessible to children than television or radio programming. See *Sable*, 492 U.S. at 128; *Bolger*, 463 U.S. at 74.

On the exercise of that right Section 10(b) places a single, easily satisfied, condition: that adults who wish to view such programs tell their cable companies, confidentially, of that choice. As the court of appeals observed, "the difference between the two systems amounts to this: under the 1984 Act, [indecent] material got into the home unless the subscriber locked it out; under the 1992 Act, [such] material does not get into the home unless the subscriber invites it in. Either way the programmers' products are available to those who want to watch them." Pet. App. 37a.

Petitioners contend (Alliance Br. 48 & n.36; DAETC Br. 43-45) that *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), bars the government in any context from requiring individuals to request expressive material as a precondition to receiving it. But *Lamont* involved a law barring the delivery of "communist political propaganda" to persons who had not written the government to request it. Apart from the fact that the statute at issue in *Lamont*, unlike Section 10(b), regulated political speech at the core of the First Amendment, Section 10(b) poses no threat of stigma or intimidation, as the court of appeals recognized. Pet. App. 39a n.23. Section 10(b) simply requires those who wish to view indecent programming on leased access channels to mail a request to their cable operators (not to the government), and federal law requires those operators to keep each such request confidential. See 47 U.S.C. 551 (1988 & Supp. V 1993).[18]

[18] When Time Warner's New York City cable subsidiary recently announced plans to scramble indecent programming on one of its

Petitioners argue that even that negligible "burden" on speech is unconstitutional because, they contend, there are even less speech-restrictive means to the same end. Petitioners claim that the government can fully vindicate its interest in shielding children from indecent programming by relying entirely on the initiative of parents to block such programming themselves, whether through "lockbox" technology or through "reverse central blocking," which would require cable operators to block indecent leased access programming only to those subscribers who specifically ask them to block it.

It is true that lockboxes provide "*one* method for dealing with obscene or indecent programming," H.R. Rep. No. 934, 98th Cong., 2d Sess. 70 (1984) (emphasis added), and so would a scheme of "reverse central blocking." But subscriber-initiated measures alone cannot solve some of the most important problems posed by indecent programming. To the contrary, as Congress recognized in passing the 1992 Cable Act, Section 10(b) constitutes the only effective means of advancing both the government's interest in facilitating parental supervision and its separate interest in ensuring that indecent programming will not harm any child whose parents have not specifically chosen to allow such programming into the home. See *Ginsberg*, 390 U.S. at 639-640.

a. In the absence of Section 10(b), subscriber-initiated blocking measures would not protect children from indecent programming unless and until their parents had taken several affirmative steps. Parents would have to discover that leased access channels convey indecent programming into their homes even though they never specifically ordered it; they would have to learn about—and focus on—their option to block such programming; and

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leased access channels, more than 50,000 subscribers responded in writing to request access to the scrambled channel. See *Goldstein* v. *Manhattan Cable Television, Inc.*, No. 90 Civ. 4750 (LBS) (S.D.N.Y. Sept. 20, 1995), slip op. 15.

they would have to take the initiative to ensure that such programming is in fact blocked. In the case of lockboxes, parents would have to discover that such devices exist; find out that their cable operators offer them for sale; spend the time and money to buy one; learn how to program the lockbox to block undesired programs; and, finally, exercise sufficient vigilance to ensure that they have, indeed, locked out whatever indecent programming they do not wish their children to view.

As Congress recognized, many parents, even those who would not affirmatively choose to permit indecent programming on their family televisions, would fail to take some or all of those steps. That fact reveals both the ineffectiveness of relying entirely on subscriber-initiated measures to protect children from viewing indecent programming and, at the same time, the principal reason why commercial providers of indecent programming would prefer to place the burden of taking action on parents who wish to keep indecency out of their homes. Given the choice, some parents would affirmatively decide to let their children view indecent programming on television. Many would affirmatively choose to keep their children from viewing such programming. Between those two poles, however, are the innumerable parents who—through absence, distraction, indifference, inertia, or insufficient information—would make no affirmative choice at all.

Petitioners' challenge to Section 10(b) rests on the premise that Congress has no valid interest in protecting the children of this latter group of parents from unimpeded access to patently offensive televised depictions of sexual and excretory functions or organs. That premise, however, is irreconcilable with this Court's decisions. The government's "compelling" interest in shielding children from indecency, *Sable*, 492 U.S. at 126, extends beyond facilitation of parental supervision to the government's own "independent interest in the well-being of its youth." *Ginsberg*, 390 U.S. at 640. As this Court observed in upholding

a prohibition on the sale of pornography to minors, "[w]hile the supervision of children's reading may best be left to their parents, the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify reasonable regulation of the sale of material to them." *Ibid.*

Significantly, Section 10(b) does not place that interest in conflict with the right of parents to bring up their children however they see fit, nor, again, does it keep those parents themselves from viewing indecent programming on leased access channels. Parents who wish to expose their children to televised indecency remain free to do just that, so long as they take the time to mail a simple request to their cable companies. Instead, among its other purposes, Section 10(b) asserts the government's interest in the well-being of those children whose parents have *failed* to decide, one way or the other, whether indecent leased access programs should continue to appear on the family television. And no provision could advance *that* interest in a less speech-restrictive manner than Section 10(b). Indeed, the government cannot advance that interest at all without establishing a default rule that, absent a clear parental choice to the contrary, children will not have access to indecent programming.

b. Even if the government's interest in regulating televised indecency were limited to the facilitation of parental supervision, Section 10(b) is the least restrictive means of achieving that end as well. The provision reflects, among other things, a reasonable presumption that many—if not most—parents, if they had to choose, would wish to have available the most effective means of keeping their children from viewing indecent programming.

Section 10(b) also eliminates the possibility that children will have the opportunity to become regular viewers of indecent programming on leased access channels long before their parents could find out and take remedial

action. Indeed, that same concern led Congress and the Commission to determine that they could not adequately protect children from exposure to "dial-a-porn" services simply by requiring telephone companies to honor a parent's request to block access to indecent prerecorded messages from the parent's home telephone. Both the Second and the Ninth Circuits have upheld that determination on the ground that "[a] parent often does not request central office blocking until after the minor has consummated a call and the parent has discovered it on the telephone bill. * * * [F]rom a practical standpoint, central blocking is invoked only after the minor's physical and psychological well-being have been damaged." *Information Providers' Coalition*, 928 F.2d at 873; accord *Dial Information Servs. Corp.* v. *Thornburgh*, 938 F.2d 1535, 1542 (2d Cir. 1991) ("[H]alf of the residential households in New York are not aware of either the availability of dial-a-porn or of blocking. * * * It always is more effective to lock the barn *before* the horse is stolen."), cert. denied, 502 U.S. 1072 (1992). In adopting its implementing regulations for Section 10(b), the Commission recognized that a similar problem would undermine the effectiveness of relying solely on lockboxes or other subscriber-initiated measures to shield children from indecency on leased access channels. See Pet. App. 134a-137a.[19]

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[19] As the court of appeals and the Commission also observed, the very nature of lockbox technology poses problems of implementation that seriously reduce its effectiveness as a means of parental supervision. Because leased access programming "may come from a wide variety of independent sources, with no single editor controlling their selection and presentation," parents forced to rely entirely on a lockbox approach would be "required to manually install, activate, and deactivate" their lockboxes each time they sought to keep indecent programming out of their homes, and their attempts "would not always be successful." Pet. App. 136a-137a; see *id.* at 34a-35a. The alternative would be to permanently block out the separate channel (which may have other, non-indecent programming

Just as important, a regulatory scheme that relied entirely on the initiative of parents to block indecent leased access programs from their own homes would do nothing at all to help parents keep their children from viewing such programs in *other* people's homes. To help parents meet that concern, Section 10(b) offers the least speech-restrictive solution: It ensures that indecent leased access programing will appear only in the homes of those who affirmatively request it. To be sure, that approach does not eliminate the possibility that, without their parents' knowledge, some children will view indecent programming in the homes of those who *do* request such programming. But that risk reflects the inevitable balance that Congress had to strike between the right of parents to insulate their children from indecent programming and the opposing right of other adults to choose to view such programming.

Alliance, though not DAETC, further contends (Br. 38) that a "safe harbor" restriction, under which indecent programming could be shown only during the late-night hours, would be less speech-restrictive than Section 10(b)'s segregation and blocking provisions. In important respects, however, a safe-harbor scheme would be *more* restrictive than Section 10(b), since segregation and blocking, unlike a chronological safe harbor, permits willing subscribers to receive indecent programming at all hours of the day.

This is not to say, of course, that a blocking scheme would be constitutionally required for every medium, since blocking is technologically feasible in some media but not in others.[20] Where technology permits a choice between

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on it) and forgo the programming on that channel "entirely." *Id.* at 137a; see *id.* at 35a.

[20] In broadcasting, for example, because it is technologically impracticable (at least at present) to implement a central office

mandatory time-of-day restrictions and a technique that permits 24-hour access, however, the First Amendment surely permits Congress to pick the latter.[21]

III. SECTION 10 IS NOT UNCONSTITUTIONALLY UNDERINCLUSIVE

Petitioners claim that, whether or not Section 10 is an effective means of shielding children from indecent programming, it is impermissibly "underinclusive," because it applies only to indecent programming on access channels and not to such programming on other cable channels. See Alliance Br. 41-43; see also DAETC Br. 47-48. That claim is without merit.

First, Sections 10(a) and 10(c) eliminate, rather than create, a distinction among cable channels. The 1984

"blocking" scheme to screen indecent programming on existing television sets and radios, Congress has employed a safe-harbor approach. See *Action for Children's Television*, 58 F.3d 654 (D.C. Cir. 1995) (in banc), cert. denied, Nos. 95-509 & 95-520 (Jan. 8, 1996).

[21] Nor does Section 10(b) impose a "prior restraint" on speech, as petitioner Alliance contends (Br. 47-48). The provision does not prevent the carriage of indecent leased access programming; it just requires that a cable subscriber submit a written request to the operator before gaining access to such programming. Because any subscriber can make such a request, Section 10(b) does not "restrain" indecent speech at all. See *Dial Information Servs.*, 938 F.2d at 1543; *Information Providers' Coalition*, 928 F.2d at 878. Alliance also complains (Br. 48) that cable operators have 30 days in which to comply with requests for access to blocked programming on leased access channels. See 47 C.F.R. 76.701(c). The 30-day period, however, is the *maximum* allowable under the Commission's rules, and in many cases access will be made available in less time. In any event, that fairly brief waiting period is necessary to ensure that a cable operator will be able to verify that the requestor is at least 18 years old. See generally Pet. App. 164a. And if the regulation permits too long a period, the appropriate remedy is to shorten the period specified in the regulation, not to invalidate the statute.

Cable Act generally barred cable operators from exercising "any editorial controls" over programming on access channels but imposed no such restriction on other channels. See 47 U.S.C. 531(e), 532(c)(2) (1988).[22] Sections 10(a) and 10(c) restore operators' editorial control over indecent programming on access channels by ensuring that cable operators have the discretion to prohibit such programming if they so choose. See 47 U.S.C. 531 note, 532(h) (Supp. V 1993).

Second, Section 10(b), which requires cable operators to segregate and block any indecent programming that they permit on leased access channels, draws a reasonable distinction between those channels and other channels. Congress found that leased access channels—which federal law compels a cable operator to transmit to subscribers as part of its basic service—presented the most severe aspect of the problem of unrequested indecent programming on cable television. Pet. App. 40a-41a. Most other indecent programming appears either on "premium" channels (such as HBO or the Playboy Channel) or as pay-per-view offerings, neither of which subscribers receive unless and until they make a specific request. See *id.* at 138a n.20. Nothing in the First Amendment prevents Congress from reasonably deciding to impose the segregation and blocking requirements of Section 10(b) only where they are most needed. See *United States* v. *Edge Broadcasting Co.*, 113 S. Ct. 2696, 2707 (1993). Under the alternative view, the First Amendment would embody a constitutional requirement that government authorities, when enacting or implement-

[22] The only exception is that cable operators must carry local broadcast stations, whose programming they cannot control. See generally 47 U.S.C. 534, 535 (Supp. V 1993); *Turner Broadcasting Sys., Inc.* v. *FCC*, *supra*. Under a separate statutory scheme, however, Congress has limited indecency on broadcast stations to the late evening hours. See generally *Action for Children's Television* v. *FCC*, 58 F.3d 654 (D.C. Cir. 1995) (in banc), cert. denied, Nos. 95-509 & 95-520 (Jan. 8, 1996).

ing otherwise permissible speech regulations, err on the side of restricting as much speech as possible.

IV. SECTION 10 IS NOT UNCONSTITUTIONALLY VAGUE

Section 10 is not rendered unconstitutionally vague because it applies to "indecent" programming, as petitioners contend. See Alliance Br. 43-47; DAETC Br. 25-32.

Under the Commission's traditional definition of indecency, which Section 10 incorporates, programming is indecent only if it "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards for the cable medium." 47 C.F.R. 76.701(g); see also 47 C.F.R. 76.702. This Court has declined invitations to find that definition unconstitutionally vague,[23] as have the several courts of appeals that have considered the issue. See *Action for Children's Television*, 58 F.3d at 659; *Information Providers' Coalition*, 928 F.2d at 874-875; *Dial Information Servs.*, 938 F.2d at 1540-1541.

Petitioners' position is also in serious tension with this Court's decisions rejecting vagueness challenges to statutes prohibiting obscenity. In *Fort Wayne Books, Inc.* v.

[23] The definition was the subject of a vagueness challenge in *Pacifica* itself, see American Broadcasting Cos., Inc., et al., Amicus Br. 33-39 (No. 77-528), but the Court upheld the Commission's authority to restrict a specific broadcast without expressing concern about the determinacy of the Commission's definition—and, indeed, after quoting portions of that definition with apparent approval. See 438 U.S. at 739, 741.

Likewise, *Sable* presented a challenge to the Commission's definition as applied to "dial-a-porn" telephone messages. See Brief for Appellant/Cross-Appellee Sable Communications of California, Inc., at 32-37 (Nos. 88-515 & 88-525). In striking down a flat congressional ban on all indecent prerecorded messages on "dial-a-porn" lines, this Court expressed no concern that any aspect of the Commission's generic definition of indecency would preclude more narrowly tailored efforts to regulate such messages. See 492 U.S. at 128.

Indiana, 489 U.S. 46 (1989), for example, the Court denied a vagueness challenge to an Indiana statute that broadly deemed any book or film "obscene" if, among other things, it "depicts or describes, in a patently offensive way, sexual conduct." See *id.* at 57-58 & n.6. That portion of the statute, which is based on the obscenity formulation announced in *Miller* v. *California*, 413 U.S. 15, 24 (1973), is virtually indistinguishable from the Commission's generic definition of indecency. Because the former is sufficiently determinate to withstand a vagueness objection, the latter is as well.[24]

Petitioners seek to avoid that conclusion by observing that no work is obscene under *Miller* unless it meets two additional criteria: (1) "the average person, applying contemporary community standards," must find that the work, "taken as a whole, appeals to the prurient interest," and (2) the work, taken as a whole, must "lack[] serious literary, artistic, political, or scientific value." 413 U.S. at 24. Yet each of the three elements of this Court's obscenity definition is conceptually independent of the other two. It is thus illogical to claim, as petitioners do, that the legal standard embodied in one of those elements ("patently offensive" depictions of "sexual conduct," see *ibid.*) can be unconstitutionally vague where indecency regulation is concerned, but permissible in an anti-obscenity statute (which, in contrast to the situation here, typically involves the imposition of criminal sanctions).

Petitioners also cite a provision of Section 10(a) entitling cable operators to bar material that they "reasonably believe[]" is indecent. See, *e.g.*, Alliance Br. 45-46; DAETC Br. 31. Apart from the state action issues raised by any challenge to Section 10(a), see pp. 13-23, *supra*, the "reasonable belief" standard, far from expanding or blurring the scope of what is covered under Section 10,

[24] Although petitioners appear to suggest otherwise, see Alliance Br. 44-45; DAETC Br. 32, this Court's precedents permit federal regulation of obscenity on a national scale. See *Sable*, 492 U.S. at 125; *Hamling* v. *United States*, 418 U.S. 87, 104-105 (1974).

simply ensures that no operator may exercise editorial control over disputed programming unless its determination of indecency is objectively "reasonable." In any event, the federal courts will resolve disputes between leased access programmers and cable operators concerning what constitutes "indecent programming" for purposes of Section 10(a), see Pet. App. 144a-145a, and the Commission will resolve such disputes for purposes of Section 10(b), see *id.* at 167a-168a & n.55; see also Alliance Br. 14-15. Similarly, PEG programmers may appeal to local franchise authorities to resolve disputes with cable operators about whether given programming is indecent for purposes of Section 10(c). See Pet. App. 194a. Petitioners suggest no basis for claiming that either the courts, the FCC, or local authorities would be unable to resolve such disputes. In any event, such speculation, without any factual or historical basis, cannot support a vagueness challenge to a regulation of indecent expression. See *Pacifica*, 438 U.S. at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

2. The Court's decisions in this area embody a judgment that the social necessity of subjecting indecency and obscenity to special regulation outweighs whatever unavoidable indeterminacy inheres in any definition of those two categories of expression. At bottom, petitioners ask this Court to disavow that judgment and forbid any governmental effort to regulate indecency in any medium. Petitioners offer no alternative definition of indecency that would avoid the supposed vagueness problems that they attribute to the traditional definition. Instead, they complain about the supposed difficulty of any effort to distinguish indecent from non-indecent speech.

Revealingly, however, petitioners confine almost all of their discussion of supposedly close cases to hypothetical controversies, see, *e.g.*, DAETC Br. 30, 35, and make no serious effort to show that the FCC has, in fact,

erroneously designated material (in any medium) as "indecent."[25] Nor do petitioners cite a single case in which any court has reversed an FCC finding of indecency. That is no accident, for the Commission has consistently taken pains, in close cases, to err on the side of determining that material is not legally indecent. See *Action for Children's Television* v. *FCC*, 59 F.3d 1249, 1261 (D.C. Cir. 1995) ("so far as this record shows the FCC is not enforcing the statutory ban on indecency against material that is not indecent"), cert. denied, No. 95-620 (Jan. 16, 1996).

The FCC's long-standing caution in this area led the Court in *Pacifica* to deny claims that the Commission's treatment of indecency would chill protected speech. See 438 U.S. at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment). Where, as here, a vagueness challenge to indecency regulations is speculative—and, for that matter, historically baseless—the proper course is "not * * * [to] pass upon the constitutionality of these regulations by envisioning the most extreme applications conceivable," but rather to "deal with those problems if and when they arise." *Id.* at 743 (plurality opinion); *id.* at 761 n.4 (Powell, J., concurring in part and concurring in the judgment).

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[25] In a footnote, petitioner DAETC cites several FCC indecency decisions with apparent but unexplained disapproval. See DAETC Br. 34 n.47. Petitioner's terseness is understandable, for the cited material contains explicit and graphic descriptions of sexual activities. See, *e.g.*, *In re Infinity Broadcasting Corp.*, 3 FCC Rcd 930, 934 (1987), modifying *In re Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987); *In re KSD-FM*, Notice of Apparent Liability, 6 FCC Rcd 3689, 3690 (1990). See also, *e.g.*, *In re Regents of Univ. of California*, 2 FCC Rcd 2703 (1987); *In re Infinity Broadcasting Corp.*, 2 FCC Rcd 2705, 2706 (1987).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC. AND AMERICAN CIVIL LIBERTIES UNION,

Petitioners,

—v.—

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TREATISE

DANIEL L. BRENNER *ET AL.*, CABLE TELEVISION AND OTHER NONBROADCAST VIDEO (1995) 6, 13

REPLY BRIEF FOR PETITIONERS DAETC AND ACLU

By conceding for the first time that § 10's provisions authorizing content-based censorship must be measured against the First Amendment — an unavoidable concession, given the clarity with which this Court has said that any content-based law passed by Congress is presumptively invalid — the government has removed the ground on which the court of appeals upheld §§ 10(a) and (c) of the 1992 Cable Act. Forced to reach the merits, and cognizant that it is extraordinarily rare for a statute to be upheld on strict scrutiny, the government now tries to avoid it, seeking "reasonableness" review of § 10's provisions that cause the most harm to free speech and "intermediate" review of § 10(b).

Neither of those standards finds support in this Court's cases, and both are fundamentally inconsistent with the constitutional guarantee of free speech. Section 10 cannot survive strict scrutiny because it will lead to the suppression of far more speech than is warranted, unjustifiably applies only to access programmers (leaving cable operators free to program identical content on their own channels), and adopts means that are far more restrictive than necessary, given the availability of lockboxes and customer-requested blocking or scrambling that will protect children equally well. Focused on "offensiveness" alone, § 10 is also unduly vague and susceptible to the kind of viewpoint-based censorship that requires procedural safeguards and judicial superintendence wholly absent here.

I.

SECTIONS 10(A) AND (C) VIOLATE THE FIRST AMENDMENT.

A. The Government Has Conceded that Not Reaching the First Amendment Challenge Presented Was Error and that No Threshold State Action Inquiry Precludes Reaching the Validity of Sections 10(a) and (c).

Petitioners challenge the constitutionality of § 10's censorship scheme, which Congress established and the Commission implemented. Congress requires cable operators either to ban or to block the content-based category of "indecent" programming on leased access channels (§§ 10(a) and 10(b)) and authorizes cable operators to ban "indecent" programming on PEG access channels (§ 10(c)). Petitioners have neither sued particular cable operators nor challenged particular decisions made under § 10.

1. Previously, the government's sole defense of §§ 10(a) and (c) was that those sections are not subject to constitutional scrutiny because the cable operators who will be doing the censoring are not state actors. *E.g.*, Opp. Pet. 12 ("the mere enactment of those provisions does not limit the speech of any individual or entity. . . . The question presented, therefore, is whether such decisions by cable operators would be properly attributable to the government"); *id.* at i ("Whether a cable operator's decision to prohibit indecent programming . . . is 'state action' attributable to the federal government"). Accordingly, the government never identified any standard of First Amendment scrutiny to be applied to §§ 10(a) and (c); its contention was rather that no review was necessary.

The en banc court of appeals adopted the government's analysis and concluded that, "[b]ecause we find no state action here . . . , we do not reach petitioners' First Amendment attack on sections 10(a) and 10(c)." Pet. 31a. Petitioners' opening brief (at 14-21) demonstrated that no case in the history of this Court has ever held that any law facially challenged, much less a content-based law, is not subject to constitutional review for lack of "state action."

The government has now effectively abandoned its prior position and conceded that all of § 10 is subject to constitutional review. Gov't Br. 20[1] ("although the conduct of cable operators in prohibiting indecent programming under Sections 10(a) and 10(c) is not properly attributable to the federal government, the statutory grant of permissive authority to cable operators to do so *must be consistent with the First Amendment*") (emphasis added); *id.* at 12 ("The enactment and governmental implementation of the statute are undoubtedly state action"); *id.* at 24 ("state action does inhere in Congress's enactment of a statute giving operators such editorial freedom"). Accordingly (and tellingly) the government rephrased its first question presented, focusing (as petitioners do, but as the court of appeals did not) on the merits of the challenge actually presented: "Whether Congress violates the First Amendment by

[1] References to petitioners Denver Area Educational Telecommunications Consortium Inc. and ACLU's opening brief are given as "DAETC Br.," and to the federal respondents brief as "Gov't Br."

permitting — but not requiring or encouraging — cable operators to prohibit indecent programming . . . ." Gov't Br. i.[2]

In short, although it does not forthrightly say so, the government agrees that the en banc court of appeals' decision not to reach the constitutionality of §§ 10(a) and (c) was error.

2. The government's recognition in Point I.B of its brief that §§ 10(a) and (c) must be measured against the First Amendment has orphaned its argument in Point I.A that cable operators' decisions should not be "attributed to the government" and has confirmed that consideration of that non-issue is unnecessary. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-48 (1936) (Brandeis, J., concurring). Neither agreement nor disagreement with the argument in Point I.A alters the necessity, now conceded, to decide whether §§ 10(a) and (c) violate the First Amendment.

Nothing in the government's brief contradicts petitioners' showing that, when a law (even a permissive law) is challenged as violative of the Constitution, the question is whether the law draws constitutionally forbidden lines or will have impermissible consequences, not whether the actors ultimately causing the harm are state actors; indeed, that latter issue is simply irrelevant. For example:

- In both *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), the plaintiffs challenged the constitutionality of permissive laws, under whose authority the defendants acted, and prior to whose passage the defendants would not have been permitted to act. The Court did not pause to consider whether Teleprompter or the employers in *Hanson* were state actors, as petitioners noted and as the government has not disputed. DAETC Br. 17, 23; *see* Gov't Br. 12-28. Regardless of that

[2] Amicus curiæ Time Warner Cable has noted with some anger the government's concession that, regardless of whether cable operators' decisions under §§ 10(a) and (c) are state action, this Court must reach the First Amendment analysis of those statutory provisions. Motion of Time Warner Cable for Leave to Argue at 4.

non-issue, both statutes were before the Court and subject to constitutional review because they were a but-for cause of the injury. Prior to enactment of the laws in question, Ms. Loretto and the railroad employees had legally enforceable statutory rights: not to be trespassed on without compensation, and not to be forced to join a union. After enactment, private parties were permitted to invade those rights.[3]

- In *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) — a suit against state officials seeking a declaration that the statute authorizing, but not requiring, churches to veto the licensure of alcoholic beverage sale within 500 feet of church property — the Court proceeded to the merits without pausing to consider whether churches are state actors (undoubtedly they are not). The governmental action before the Court was the statute itself (constrained by the Constitution and therefore necessarily subject to constitutional review), which was claimed, and found, to draw a line forbidden by the First Amendment.

- In *Hunter v. Erickson*, 393 U.S. 385 (1969), the Court again did not pause to consider whether the realty agent who had refused to show the plaintiff houses on a for sale list was a state actor (undoubtedly she was not), because the challenge was to the law that allowed discrimination by insulating it from challenge, not to any private conduct.

Similarly, this case requires a decision on the merits of whether the challenged statutory scheme — prior to whose enactment cable operator interference with speech on access channels was forbidden — exceeds constitutional limitations, but does not require an unnecessary excursion into whether the newly permitted actions are performed by state actors.

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[3] To the extent that the government criticizes petitioners for suggesting that *Hanson* renders all decisions by private employers to enter into or enforce union shop agreements attributable to the government, and by extension renders all decisions of cable operators state action, it tilts at windmills. Gov't Br. 20. Petitioners have not so contended and indeed see no occasion for addressing that issue in this case, as any consideration of it would be *dicta*.

B. Sections 10(a) and (c) Are Invalid under Strict Scrutiny Because They Are Content-Based and Speaker-Based Authorizations to Censor Whose Practical Effect Will Be a Diminution of All Speech Cable Operators Could Reasonably Term Offensive.

Sections §§ 10(a) and (c), on their face and in practical impact, are "regulations that *suppress, disadvantage, or impose differential burdens* upon speech because of its content"; they are therefore subject under existing authority, at a minimum, to "the most exacting scrutiny." *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2459 (1994) (emphasis added); *see* cases cited at DAETC Br. 14, 38-39.[4] Neither the Commission nor the court of appeals ever questioned that § 10 is subject to strict scrutiny to the extent it is subject to any review (*see* Pet. 131a-40a; Pet. 32a), and the government now recognizes that §§ 10(a) and (c) are content-based regulations (Gov't Br. 24-25).

This Court has held that a ban of "indecent" speech cannot survive strict scrutiny. *Sable Communications of Calif., Inc. v. FCC*, 492 U.S. 115, 126-27 (1989); *see FCC v. Pacifica Found.*, 438 U.S. 726, 750 & n.28 (1978) (implying that a ban on broadcasting indecent language would violate the First Amendment). Indeed, for this very reason, the government conceded at oral argument before the court of appeals that, if §§ 10(a) and (c) involve state action, they are constitutionally invalid (Pet. 104a n.9, 110a n.15, 111a n.16), and it does not even now argue that they can survive strict scrutiny (*see* Gov't Br. 24-28).

Sections 10(a) and (c) fall under *Sable* because they authorize, and are likely produce for millions of households, a complete ban on access channels of programming that might be considered "indecent." Far from generally restoring editorial discretion,

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[4] The government has failed to respond to petitioners' contention (at 38-39) that, because §§ 10(a) and (c) authorize the prohibition of speech based solely on content, they should be held per se invalid without further inquiry. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 124-28 (1991) (Kennedy, J., concurring).

Congress expressly and with pinpoint precision armed cable operators with "authority to enforce" a written policy "prohibiting" access programming of specified disfavored content. Pet. 126a; *see* DAETC Br. 14-15. In every community in which a cable operator implements a policy prohibiting the cablecast of any access programmer speech the operator "reasonably" deems to be "indecent," the effect of this delegation of authority will be indistinguishable from a direct congressional ban on indecent speech, whose invalidity would seem plain under *Sable*. The record shows that cable operators are planning to adopt such bans; a result virtually foreordained by their lack of commitment to the programmer speech being censored, their concern for liability, their burdensome alternative in § 10(b), and their strong economic incentive to transfer viewership to operator-controlled channels.[5]

C. The Standard Applicable to Sections 10(a) and (c) Is Not the Proposed "Reasonable and Viewpoint-Neutral" Standard.

In order to evade the invalidation of §§ 10(a) and (c) that the government conceded below strict scrutiny would entail, the government now advances the afterthought that §§ 10(a) and (c) were enacted to protect the expressive rights of cable operators and that "indecency" can assault the sensibilities of those who wish to avoid it; therefore strict scrutiny is not required and those provisions are valid so long as they are reasonable and viewpoint-neutral. Gov't Br. 24-28. The government's proposed standard is contrary to *Turner*, *Simon & Schuster*, and *Sable*, and its premise is mistaken.[6]

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[5] DAETC Br. 7-8 & n.9; Acton Corp, JA 1-2; InterMedia Partners, JA 77-78; Community Antenna Television Ass'n, JA 175-76; InterMedia Partners, JA 228-29; *see* DANIEL L. BRENNER ET AL., CABLE TELEVISION AND OTHER NONBROADCAST VIDEO § 6.09[4][b][i], at 6-102.1 ("operators would have a strong incentive to prohibit far more access programming than necessary") (1995); *id.* § 6.09[4][b][ii][C], at 6-102.6 to 102.8.

[6] Even respondent National Cable Television Ass'n, Inc. agrees with petitioners that "[t]his Court has made clear . . . that indecency is (continued...)

1. The government's premise is that Congress adopted §§ 10(a) and (c) for a structural purpose, namely to protect "the expressive rights of cable operators." Gov't Br. 24; *see also id.* at 28. However, Congress expressly asserted a very different purpose (one that focused on the communicative impact of certain disfavored speech): "Children's Protection From Indecent Programming on Leased Access Channels." Pet. 126a.[7] Congress nowhere described any interest in "restoring editorial discretion" to cable operators over access channels, which would be an oxymoron in any event because access channels by definition are not (and never were) editorially controlled by cable operators, who function on those channels merely as conduits. *See* DAETC Br. 3 n.1.[8] Both § 10's title and structure confirm in multiple ways that protecting "the expressive rights of cable operators" was not Congress' purpose.[9] The authority doled out in §§ 10(a) and (c) was the

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[6](...continued)
protected speech and, indeed, that strict scrutiny applies broadly to strike down content-based efforts to single out 'indecent' but non-obscene speech for government-imposed bans or *other direct impairments of private choices*." NCTA Br. 6 (emphasis added).

[7] The court of appeals described Congress' interest in § 10 as "'protecting the physical and psychological well-being of minors.'" (Pet. 32a (citation omitted).) Petitioners have recognized for the purpose of these proceedings Congress' asserted § 10 interests of "enabling parents to protect their children from harm and . . . directly protecting children from harm in circumstances where parental supervision is likely to be systematically or structurally impracticable." DAETC Br. 40.

[8] The assertion of amicus curiæ Time Warner Cable that leased access did not exist prior to 1984 (at 14) is patently false, as it surely knows. *See, e.g.*, N.Y. EXEC. L. § 829.

[9] Any notion that "restoring editorial discretion" is the purpose behind §§ 10(a) and (c) is dispelled by the fact that §§ 10(a) and (c) narrowly delegate to cable operators only the "authority to enforce" a policy prohibiting only one specific content-based category of speech that Congress wishes to suppress. Section 10(b), which requires cable operators to block unprohibited leased access programming, is also hardly indicative of a purpose of restoring operators' editorial freedom.

means Congress used to diminish the quantity of unwanted speech (assertedly to protect children), not an end in itself.[10]

2. None of the cases cited by the government (at 25) supports the notion that strict scrutiny is only applicable for viewpoint discrimination, and this Court's cases are directly to the contrary. *See, e.g., Simon & Schuster*, 502 U.S. 105; *Carey v. Brown*, 447 U.S. 455 (1980); DAETC Br. 14 & n. 15, 16 n.21. If the law were otherwise, Congress could outright ban all speech on particular subjects — nuclear testing, for example — subject only to "reasonable basis" scrutiny.

Nor is the government correct in considering § 10 not viewpoint-based. Gov't Br. 26. The programming that cable operators are likely to censor under §§ 10(a) and (c) is not distinguishable as a neatly definable subject matter, like the "music or sports" or "politics and world events" categories that the government's brief imagines. "Indecency" can be used, has been used,[11] and (considering this nation's well-known struggles over cultural freedom or regimentation) will undoubtedly be used again, as an excuse to censor valuable programs on such subjects as abortion, AIDS, safe-sex education, controversial art, and breast self-examination.

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[10] Congress delegated censorship power to cable operators expressly to achieve its asserted interest in limiting "indecency" on access channels without triggering constitutional scrutiny. *E.g.*, 138 CONG. REC. S649 ("[Indecent and other undesired programming] should be stopped, must be stopped, and I think this amendment will empower the cable operators to stop it") (daily ed. Jan. 30, 1992). Editorial discretion is not established by the power solely to censor or block, but necessarily entails the right to select and edit — to speak. *See, e.g., Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

[11] For example, amicus curiæ Time Warner Cable has already attempted to enforce a § 10(a) written policy and in so doing initially decided to scramble several programs by Gay Cable Network even though it later admitted that none of them contained "indecent" material. (Sept. 12, 1995 and Sept. 13, 1995 declarations of Clarence Grier in opposition to motion for preliminary injunction in *Goldstein v. Manhattan Cable Television, Inc.*, 90 Civ. 4750 (LBS) (S.D.N.Y.).)

In view of the breadth of the "indecency" definition, the "wide discretion" accorded cable operators to censor even more broadly under a "reasonable belief" in indecency standard, and the license to censor without requirement of prompt judicial or even administrative superintendence (*see* Point III below), §§ 10(a) and (c) are so susceptible to viewpoint-based enforcement that they necessarily draw the most exacting scrutiny. *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 762-69 (1988).[12]

3. To rationalize its "reasonableness" standard, the government also asserts that indecent programming is an "'assault' on the sensibilities of those who wish to avoid it" (Gov't Br. 27) and implies that §§ 10(a) and (c) represent a proper remedy (*id.* at 26-28.)

No one doubts that people should be allowed to avoid speech that they find offensive or an "assault" on their sensibilities, and *Sable* and numerous other cases make plain that that concern, if it were one underlying § 10, would be relevant to consideration of the merits. There is, however, no precedent for using it to reduce the scrutiny afforded as well, which would be an odd and unnecessary form of "double counting."

Lowering the scrutiny afforded protected speech would be particularly destructive of free speech here, for whatever unwilling viewer problem exists can be effectively addressed by a myriad of

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[12] A major part of the problem is that neither the cable operator nor the access programmer can know what the term "indecency" covers. *E.g.*, InterMedia Partners, JA 228-31 (will "prohibit *potentially* obscene and indecent material" and will review "any program material which might conceivably be construed as obscene or indecent"). The assertion that the Commission has limited "indecent" speech to "explicit and graphic descriptions of sexual activities" (Gov't Br. 46 n.25) is irrelevant, for that does not bind cable operators, the Commission, or the courts. The Justice Department's wish that Congress and the Commission had said something more specific than "patently offensive" cannot cure a facially vague and overbroad law. *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04 (1967) ("'[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms'") (citation omitted) (modification in original).

far less restrictive alternatives than general prohibition, such as customer-requested blocking or lockboxes. *E.g.*, Telecommunications Act of 1996, Pub. L. No. 104-___, § 504 (Gov't Supp. 1a). When coupled with disclosure of the nature of programming on each cable channel (with descriptive information, not conclusory, denigrating labels like "indecent"), viewers can tailor what they bring into their home through cable.[13]

Many types of protected speech assault or offend. Some feel "assaulted" by inane situation comedies, others by football, by open-heart surgery on The Discovery Channel, by violent programming, by offensive uses of the flag, or by jingoistic news reporting. That speech has the ability to "assault" one's sensibilities does not relegate it to lesser First Amendment protection.

II.

SECTION 10(B) VIOLATES THE FIRST AMENDMENT.

A. Section 10(b) Is Subject, at a Minimum, to Exacting Scrutiny.

The government agreed below that strict scrutiny applies to § 10(b)'s blocking scheme, and the court of appeals so held (Pet. 32a-36a), probably for the good reason that all nine members of this Court agreed in *Turner* that content-based regulations of speech on cable television would be subject at a minimum to strict scrutiny. Undeterred, the government now argues (for the first time) that, because the content being regulated is "indecent" programming,

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[13] The government's equation of indecency on cable access with nudity on highway billboards not only ignores *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), which *protected* such displays, but also creates a false analogy. Although a driver cannot know in advance what may be displayed in public on a billboard in order to avoid it, cable viewers can be fully informed about the nature of programming on the cable system affirmatively brought into the home, and the technology exists on all cable systems to block any channel upon request. Indecency on access channels is far more like magazine nudity, where an informed reader can tell from the cover what may be found inside and avoid it if so inclined.

§ 10(b) is subject only to the lower standard that (it asserts) this Court applied in *Pacifica*. Gov't Br. 28-33.

This last-minute effort to reduce the level of scrutiny (a sure sign that § 10(b) would fail strict scrutiny) ignores, or finds spurious grounds for distinguishing, the unbroken line of authority holding that laws that regulate on the basis of content, or that directly and substantially burden free expression, are subject for either reason to outright invalidation or, at a minimum, the most "exacting scrutiny." *E.g.*, *Turner*, 114 S. Ct. at 2459; *Texas v. Johnson*, 491 U.S. 397, 406-07 (1989); *see* DAETC Br. 14 & n.15, 38-39.

The government seeks a "more lenient standard of review," which it dubs the "*Pacifica* doctrine." Gov't Br. 28, 32-33. But *Pacifica* styled itself, and subsequent cases have treated it, as a limiting case (*see* DAETC Br. 32-34); "the verge," not a "platform for yet further steps."[14] The opinions in that case can be searched in vain for any hint that the Court there adopted a distinctive, "lenient" standard of review for any class of First Amendment cases. (For all those opinions show, strict scrutiny was applied.) As petitioners showed in an argument that the government simply ignored, *Pacifica* addressed neither the standard of review nor the constitutionality of a regulation of "indecent" *programming* and resolved only the narrow question of whether the Carlin monologue's use of seven dirty *words* as broadcast that particular day and time could be the basis for placing a critical letter in the licensee's file. *Compare* DAETC Br. 32-36 *with* Gov't Br. 29-33.

Any effort to discern a lesser standard of review for indecency regulation in *Pacifica* would founder on *Sable*'s holding that the government may not "regulate the content of constitutionally protected speech [such as indecent speech] in order to promote a compelling interest" unless it "chooses the least restrictive means to further the articulated interest." 492 U.S. at 126.

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[14] *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2551 (1995) (Souter, J., dissenting) (quoting Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602, 624 (1971)); *see Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74 (1983); *Pacifica*, 438 U.S. at 750.

In attempting to carve out an indecent programming exception to *Turner* based on *Pacifica*, the government relies on two factors: cable's presence in the home, and its accessibility to children. Gov't Br. 29, 30. Although cable does have those two factors in common with the broadcast media, so does the telephone medium, which was under consideration in *Sable*, and so also do others.[15] Reducing the level of scrutiny (a bulwark of free speech protection) on the basis of these factors is utterly inconsistent with the preservation of free speech; it would require overruling not only *Sable* but also *Turner*, to say nothing of *Stanley v. Georgia*, 394 U.S. 557 (1969). Neither *Pacifica* nor reason supports such a result, especially so long as the definition of "indecency" is so broad as to sweep up not only speech at the border of obscenity, but also speech lacking any prurient appeal and containing serious artistic, educational, scientific, and social value.

To the extent that a refusal to overextend *Pacifica* may lead to different regulation of "indecent" programming on broadcast television and on cable (Gov't Br. 31), that disparity is one to which this Court has long ago reconciled itself. *Turner* is just the most recent in a line of cases refusing to treat the broadcast regulation doctrine as a stepping stone for reducing First Amendment protection in other media.[16]

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[15] THE NEW YORKER has lately reproduced Richard Avedon photographs of nude women, showing in one issue bare-breasted Las Vegas showgirls. These magazine issues meet all of the government's indicia warranting "lenient" review for censorship, as they undoubtedly confront many readers with young children with, in the government's colorful if leaden phrase, "unexpected components of a highly diversified programming package" (Gov't Br. 30).

[16] Different regulation itself can hardly be a dispositive problem here, for, if the government were to prevail, (1) cable operators would be free to show to children on commercial channels programs comparably "indecent" to those prohibited entirely or blocked on access channels, and (2) cable operators would be required to block on an access channel the very "indecent" program that, if it were broadcast by a network during safe-harbor hours, they would be required to carry.

B. Section 10(b) Cannot Survive Exacting Scrutiny.

The government's application of strict scrutiny to § 10(b) (Gov't Br. 33-41) fails to address much of petitioners' argument, *e.g.*, that § 10(b) reaches far more speech than necessary (*see* DAETC Br. 42), and gets wrong what it does discuss.[17]

1. The government's labored effort to show how carefully Congress matched means to ends is a doomed enterprise, given the fact — conveniently ignored — that § 10 was offered as floor amendments on the last legislative day before the Senate approved its bill, was never sent to any committee, and was never the subject of any congressional hearings or findings. It should not be surprising if, as turned out, the result was not the precisely tailored legislation required in this area.

Nor is the misconceived blocking scheme well served by the government's defense. For example, the government contends that § 10(b) advances the interest of "helping parents exercise 'authority in their own household to direct the rearing of their children'" (Gov't Br. 33), without noticing that that interest is directly thwarted by § 10(a), which allows cable operators to foreclose parents' decisions. (This contradiction augments the doubt, already suggested by the minutes-long legislative history, that Congress had any such interest in mind.)

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[17] For example, the government belittles § 10(b)'s underinclusiveness by resorting again to a "one step at a time" argument (Gov't Br. 41-43), which is inapplicable to speech regulation, without confronting the constitutional problem of regulating "indecent" speech only on leased access channels. *See* DAETC Br. 47-48; BRENNER, CABLE TELEVISION § 6.09[4][b][ii][C], at 6-102.7. Section 505 of the Telecommunications Act does not remedy § 10's underinclusiveness because it only applies to channels "primarily dedicated to sexually-oriented programming." Gov't Supp. 2a. Petitioner DAETC, as well as PEG programmers, are surely not "primarily" dedicated to sexually-oriented programming; nonetheless, only their programming, and not that of Tele-Communications Inc. or Time Warner Cable, must be blocked or scrambled if "indecent."

Similarly, instead of forthrightly conceding that Congress' goal was to protect children whose parents would not want them to see such speech — an interest that is easily served by far less restrictive means — the government has done precisely what New York State did (and was condemned for) in *Simon & Schuster*, 502 U.S. at 120: "taken the effect of the statute and posited that effect as the [state government's] interest." Here, the Court is implausibly told that Congress enacted § 10(b), notwithstanding the availability of numerous ways parents can keep unwanted access (or other) cable programming from their children, principally to aid "the innumerable parents who — through absence, distraction, indifference, inertia, or insufficient information — would make no affirmative choice at all." Gov't Br. 37.

Given all of the means outlined in the briefs of both groups of petitioners — and the additional one in § 504 of the Telecommunications Act of 1996 whereby cable operators are required to, "upon request . . . , without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying [cable] programming so that one not a subscriber does not receive it" (Gov't Supp. 1a) — one thing is clear: any parent has or can easily obtain the tools and information necessary to keep access programs out of their households, if that is their choice.

The government's jerry-rigging of the interest underlying § 10 reveals its true argument: *all* adults must be denied the right to view any "indecent" leased access programs (if they do not want to send in "please give me the indecency channel" postcards), because *some* parents either deliberately or negligently will not use the tools already at hand (monthly inserts from the cable company, lockbox instructions, newspaper articles, telephone calls to the cable company) that will allow any parent to protect his or her children from unwanted speech. Moreover, even adults who, although initially disinclined to send in a blanket request for "indecency," later decide to seek access to a particular program scheduled to be cablecast in the next days or weeks must also (in all likelihood) be denied access to such a program.

Where the government's interest can be effectively met with means readily at hand, the First Amendment precludes more

restrictive content-based regulation that results in the suppression of speech to willing listeners, which suppression can be deemed "necessary" only because of "absence, distraction, indifference, inertia, or insufficient information" (Gov't Br. 37). The principle of *Butler v. Michigan*, 352 U.S. 380 (1957), requires no less.[18]

2. Notwithstanding this Court's holding in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), that requiring affirmative requests for protected speech is never the least restrictive means (*see* DAETC Br. 43-45), the government would limit *Lamont* to core political speech (Gov't Br. 35). Nothing in *Lamont* supports that limitation, and *Sable*, 492 U.S. at 126, plainly holds that "indecent" speech is entitled to full First Amendment protection.

The contention that § 10(b) "poses no threat of stigma or intimidation" blinks reality. Gov't Br. 35. For many — for judges, clerics, those seeking political careers, teachers of young children, and those in small towns, among others — the prospect of creating a written request for "indecent" speech would be precisely the kind of barrier that *Lamont* forbids.[19]

3. In the end, the government's argument is indistinguishable from that it advanced (unsuccessfully) in *Sable*: when marginal gains in effectiveness are weighed against harm to free speech interests, the former always wins. *See* Gov't Br. 36-40. However, the First Amendment makes a different choice. *Sable*, 492 U.S. at 128-31; *id.* at 132 (Scalia, J., concurring).

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[18] The very fact that cable is in the home, rather than in public, demonstrates the government's lesser interest here in directly protecting children. Although this Court recognized the legislatures' expressly stated interests in protecting children in *Sable*, 492 U.S. 115, and in *Ginsberg v. New York*, 390 U.S. 629 (1968), both of those cases involved exposure to speech *outside* of the home where parents necessarily had less ability to control the speech to which their children would be exposed.

[19] For proof of the stigma and condemnation that those seeking access would risk, see generally the briefs of amici curiæ National Family Legal Foundation, Morality in Media, Inc., and the Family Life Project of the American Center for Law and Justice.

Nor has the government explained why the thirty-day waiting period is least restrictive when cable operators currently have the ability to unscramble immediately; indeed, it virtually concedes that the delay is unjustifiable. Gov't Br. 41 n.21.

4. The government entirely ignores the separate burdens that the blocking scheme imposes on leased access programmers. For example, the Commission's implementation of § 10(b) permits cable operators to expel permanently leased access programmers from their systems for failure "correctly" to certify programming as "indecent." 47 C.F.R. § 76.701(f), Pet. 172a. As *Pacifica* itself confirmed, lesser measures, such as moderate fines, warning letters, or admonitions, would suffice without the over-deterrence that § 76.701(f) will cause. 438 U.S. at 735-38.

III.

SECTION 10 IS VAGUE AND LACKS PROCEDURAL SAFEGUARDS ESSENTIAL TO ENSURE THAT ONLY SPEECH CONSTITUTIONALLY SUBJECT TO REGULATION IS CENSORED OR BLOCKED.

Obscenity law from the late 1940's to *Miller v. California*, 413 U.S. 15 (1973), is largely the story of the successful development of two tools — vagueness doctrine and certain required procedural safeguards — to ensure that any regulation or prohibition of speech applies only to speech that is not constitutionally protected or that actually causes harms the government can seek properly to avoid. The government's response to petitioners' vagueness/procedural safeguards argument (Gov't Br. 43-46) confirms the compelling need for this Court to revisit and apply those tools. It cannot be that means developed to ensure that protected speech would not be suppressed in the name of obscenity regulation suddenly become irrelevant when protected speech faces that same risk of suppression in the name of "indecency."

1. No case supports the assertion that this Court has made the "judgment that the social necessity of subjecting indecency . . . to special regulation outweighs whatever unavoidable indeterminacy inheres in any definition of" such expression. Gov't Br. 45. To the contrary, petitioners showed (and the government does not dispute) that this Court has never passed on whether the definition

of "indecency" used in this scheme is void for vagueness, having declined to do so in *Pacifica*. *Compare* DAETC Br. 32-36 *with* Gov't Br. 43-46. The three-part *Miller* test is necessarily more limiting than a test that uses only one (and the most purely subjective) of *Miller*'s three elements.

Pacifica concluded only that a proscription of "indecent language" clearly enough reached seven dirty words uttered repetitively in the afternoon to warrant a warning letter and, with the guidance of that decision, could be used to warrant fines against others in the future. 438 U.S. at 750. That hardly amounts to this Court's considered "judgment" that Congress cannot do better in the service of protecting children than craft a statute phrased in terms of "patent offensiveness" to adults, especially where the definition is used for censorship, not just a warning.

2. The government also fails to address petitioners' showing that, when the interest is in protecting children, it is perverse to focus on "patent offensiveness" to *adults*. *Compare* DAETC Br. 27-32, 42 *with* Gov't Br. 43-46. Congress can serve its interest far more precisely by focusing on specific harms to children and by eliminating the baggy ambiguity of a definition that is too easily used as a basis for censoring, for example, any photograph or verbal description of breasts or buttocks.

Congress could also specify factors necessary for a finding of indecency (*e.g.*, prurient appeal) or disqualifying factors (*e.g.*, serious value). Although still not perfectly precise, these would measurably reduce § 10's vagueness by placing clearer limits on the "wide discretion" accorded cable operators through a standard that at its birth was expressly declared probably insufficient as a basis for a ban on protected speech, *Pacifica*, 438 U.S. at 756-57 (Powell, J., concurring). Access programmers would obtain meaningful security with respect to the continued development and dissemination of important and valuable programs on such topics as AIDS, breast, prostate, or testicular cancer, safe-sex education, or photography by Nan Goldin, Robert Mapplethorpe, Cindy Sherman, and many other highly regarded but controversial artists.

The government has not even tried to dispute the contention that § 10's definition leaves access programming at high risk of being suppressed by cable operators under the present capacious definition, even though such suppression would never be upheld by this Court. *See* DAETC Br. 29; *see generally* Brief of amicus curiæ Ass'n of Am. Publishers, Inc. That risk should be more than sufficient basis for finding § 10 impermissibly vague.

3. The key problem with § 10, which the government slides over when it says that there is little value in "indecent" speech, is that the only portion of the definition that prevents it from reaching *all* nudity and *all* but the most closeted references to sexuality is "patent offensiveness." Offensiveness is a wholly subjective term that this Court has repeatedly held an insufficient basis for speech regulation; one that leads inexorably to over-censorship, over self-censorship, and viewpoint-based censorship. DAETC Br. 29.

The government seems confident that "indecency" reaches only "explicit and graphic descriptions of sexual activities." Gov't Br. 46 n.25. But nothing in the definition of "indecency" justifies that confidence by confining cable operator censorship (much less hostile cable operator censorship) within circumscribed bounds.[20]

4. Nor, finally, does § 10 contain procedures, as required by the First Amendment, to confine censorship to speech whose suppression could be thought genuinely to advance the purpose underlying § 10 (avoiding harm to children). The government would have this Court disregard the vagueness of authorizing cable operators to censor what they "reasonably believe" to be "indecent" in reliance

---

[20] The government cites Commission decisions, which show what has been found indecent, but which provide no indication of any outer limits or any restriction of "indecency" to only speech that would harm children or that has a prurient intent. Gov't Br. 46 n.25. Nothing in those decisions would restrain a cable operator from censoring a documentary on the recent exhibition entitled "Feminine/Masculine: The Sex of Art" at the Pompidou Centre in Paris, the film *Carnal Knowledge*, or a program on women's health issues demonstrating breast self-examination, and nothing therein would make irrational a programmer's self-censorship of such programs in order to avoid having its access terminated.

on the Commission's asserted "long-standing caution in this area." Gov't Br. 46. But § 10's very structure bars such reliance, because it entrusts the power to blank out access programming not to the Commission after hearings, but to the cable operators either unreviewably or with such inadequate, delayed review (*e.g.*, in state court breach of contract actions) as to be wholly insufficient protection of free speech. *See* Pet. 166a-68a, 194a.

The Commission's asserted "caution" is irrelevant when it is cable operators who will be censoring on a "reasonable belief" standard, thereby yielding a far broader scope (but indeterminately so) for "indecency" than the Commission's application of the underlying standard. DAETC Br. 31. Finding comfort in the Commission's "caution" is particularly perverse when one of the reasons this Court could safely not reach the vagueness challenge in *Pacifica* was that the Commission has no authority to censor speech in advance; its only power is retrospective, to consider, after hearings, speech that has already occurred. 438 U.S. at 735-36, 742. Indeed, the Court stressed that it was approving the use of "indecency" only as a basis for a warning. *Id.* at 742, 750.

Unlike the regime considered in *Pacifica* and subsequently by courts of appeals, "indecency" can be used under § 10 to censor speech in advance, and the Commission does not control those applications. (To the contrary, it was expressly denied such control in the hope of insulating §§ 10(a) and (c) from judicial review.)

The government has not disputed petitioners' showing that access programmers and viewers have no recourse to the Commission when they complain of undue censorship under §§ 10(a) and (c). *Compare* DAETC Br. 9 n.10 *with* Gov't Br. 43-46. Nor has it answered petitioners' demonstration that §§ 10(a) and (c) authorize the censorship of protected speech of access programmers — permanently denying it to viewers who would have liked to see it, and indeed to many asking to see it (because of the 30-day turn-on delay) — without any requirement that the censor bear the burden of instituting proceedings on a final, not provisional, basis and without any provision for prompt judicial review. DAETC Br. 36-38.

CONCLUSION

For all the foregoing reasons, § 10 and its implementing regulations are unconstitutional. The judgment below should be reversed.

Respectfully submitted,

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OCTOBER TERM, 1995

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v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL BRIEF FOR THE FEDERAL RESPONDENTS

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This brief is submitted pursuant to Supreme Court Rule 25.5 to notify the Court of newly enacted legislation. On February 8, 1996, the President signed into law the Telecommunications Act of 1996, Pub. L. No. 104-104 (the 1996 Act). The three provisions

of that statute noted herein are reprinted in the Appendix to this brief.

1. Section 504 of the 1996 Act provides that, "[u]pon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it." App., *infra*, 1a. That provision generally enables subscribers to ensure that they will receive only those cable channels to which they subscribe and that they will not receive either the audio or video portions of any channel to which they do not subscribe. It applies to all cable channels, regardless of the content of the channel or any of the programming on that channel. In our view, it has no bearing on the legal issues in this case.

2. Section 505 of the 1996 Act provides that a "multichannel video programming distributor"—a phrase that includes cable operators, see 47 U.S.C. 522(12) (Supp. V 1993)—must scramble or block "sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming." App., *infra*, 2a. That requirement extends to both audio and video portions of such programming. Until the distributor can commence such scrambling or blocking, Section 505 requires the distributor not to provide such programming "during the hours of the day (as determined by the [Federal Communications] Commission) when a significant number of children are likely to view it." *Ibid.*

Section 505 neither modifies nor amends any of the provisions of Section 10 of the 1992 Cable Act that petitioners challenge in this case. Section 505,

however, has effects similar to Section 10(b) of the 1992 Cable Act in one respect. Section 10(b) provides that cable operators who permit the showing of indecent programming on commercial access channels must segregate such programming on separate channels and block it unless and until the subscriber requests access to it. Section 505's blocking scheme extends a similar requirement to channels "primarily dedicated to sexually-oriented programming." It therefore may have relevance to petitioners' underinclusiveness argument. See Alliance Br. 41-43; DAETC Br. 47-48.

3. Section 506 of the 1996 Act includes two provisions that amend sections of the Communications Act providing that cable operators shall exercise no editorial control over, respectively, PEG and leased access channels.

a. Section 506(a) applies to PEG channels. Since 1984, the Communications Act has provided that "a cable operator shall not exercise any editorial control over any public, educational, or governmental use of channel capacity." 47 U.S.C. 531(e). One of the provisions added in 1992 and challenged in this case, however, permits operators to exercise limited editorial control. Section 10(c) of the 1992 Cable Act provides that the FCC "shall promulgate * * * regulations * * * to enable a cable operator of a cable system to prohibit the use * * * of any [PEG channel] for any programming which contains obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Pub. L. No. 102-385, 106 Stat. 1486 (47 U.S.C. 531 note (Supp. V 1993)). See U.S. Br. 5-6 (discussing FCC's interpretation of that language).

Section 506(a) of the 1996 Act amends the earlier provision regarding cable operators' editorial control, 47 U.S.C. 531(e), to add the following language: "except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity." App., *infra*, 3a. Section 506(a) does not amend Section 10(c), and no provision that petitioners attack is altered by the new statute.

b. Section 506(b) makes virtually identical changes to the leased access provisions of the Communications Act. Since 1984, the statute has provided that "[a] cable operator shall not exercise any editorial control over any video programming [on a leased access channel], or in any other way consider the content of such programming," with a single exception not relevant here. 47 U.S.C. 532(c)(2). One of the provisions challenged in this case, however, permits operators to exercise limited editorial control. Section 10(a) of the 1992 Cable Act, codified at 47 U.S.C. 532(h) (Supp. V 1993), provides that "[t]his subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards."

Section 506(b) of the 1996 Act amends the earlier provision regarding cable operators' editorial control, 47 U.S.C. 532(c)(2), to provide that "a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity." App., *infra*, 3a. Section 506(b) does not amend Section 10(a), and no

provision that petitioners attack is altered by the new statute.

c. Insofar as Section 506 merely conforms the previously unqualified language of 47 U.S.C. 531(e) and 532(c)(2) to recognize a cable operator's right to prohibit obscene or indecent access programming that had been the subject of Sections 10(a) and 10(c) of the 1992 Cable Act, Section 506 has no effect on the First Amendment rights of petitioners. If Section 506, however, is believed by petitioners or others to have some additional effect on their claimed First Amendment rights, their appropriate course would be to challenge Section 506 in an action before a three-judge court, pursuant to Section 561 of the 1996 Act.

Respectfully submitted.

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FEBRUARY 1996

APPENDIX

The Communications Decency Act of 1996, enacted as Title V of the Telecommunications Act of 1996, Pub. L. No. 104-104, provides in pertinent part as follows:

TITLE V—OBSCENITY AND VIOLENCE

* * * * *

SEC. 504. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

Part IV of title VI (47 U.S.C. 531 et seq.) is amended by adding at the end the following:

"SEC. 640. SCRAMBLING OF CABLE CHANNELS FOR NONSUBSCRIBERS.

"(a) SUBSCRIBER REQUEST.—Upon request by a cable service subscriber, a cable operator shall, without charge, fully scramble or otherwise fully block the audio and video programming of each channel carrying such programming so that one not a subscriber does not receive it.

"(b) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

SEC. 505. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

(a) REQUIREMENT.—Part IV of title VI (47 U.S.C. 551 et seq.), as amended by this Act, is further amended by adding at the end the following:

"SEC. 641. SCRAMBLING OF SEXUALLY EXPLICIT ADULT VIDEO SERVICE PROGRAMMING.

"(a) REQUIREMENT.—In providing sexually explicit adult programming or other programming that is indecent on any channel of its service primarily dedicated to sexually-oriented programming, a multichannel video programming distributor shall fully scramble or otherwise fully block the video and audio portion of such channel so that one not a subscriber to such channel or programming does not receive it.

"(b) IMPLEMENTATION.—Until a multichannel video programming distributor complies with the requirement set forth in subsection (a), the distributor shall limit the access of children to the programming referred to in that subsection by not providing such programming during the hours of the day (as determined by the Commission) when a significant number of children are likely to view it.

"(c) DEFINITION.—As used in this section, the term 'scramble' means to rearrange the content of the signal of the programming so that the programming cannot be viewed or heard in an understandable manner.".

(b) EFFECTIVE DATE.—The amendment made by subsection (a) shall take effect 30 days after the date of enactment of this Act.

SEC. 506. CABLE OPERATOR REFUSAL TO CARRY CERTAIN PROGRAMS.

(a) PUBLIC, EDUCATIONAL, AND GOVERNMENTAL CHANNELS.—Section 611(e) (47 U.S.C. 531(e)) is amended by inserting before the period the following: ", except a cable operator may refuse to transmit any public access program or portion of a public access program which contains obscenity, indecency, or nudity".

(b) CABLE CHANNELS FOR COMMERCIAL USE.—Section 612(c)(2) (47 U.S.C. 532(c)(2)) is amended by striking "an operator" and inserting "a cable operator may refuse to transmit any leased access program or portion of a leased access program which contains obscenity, indecency, or nudity and".

* * * * *

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT

The Association of American Publishers, Inc. (AAP) submits this brief *amicus curiae*, pursuant to Rule 37 of the Rules of this Court, urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

THE AMICUS

AAP is the major national association in the United States of publishers of general books, textbooks and educational materials. Its approximately 200 members include most of the major commercial book publishers in the United States and many smaller or non-profit publishers, including university presses and scholarly associations. AAP members publish most of the general, educational and religious books produced in the United States.

As technology evolves, and the means by which the American public receives information proliferate, AAP's members are themselves experiencing profound change. To be sure, the publication of hardcover and softcover books, and their distribution to the nation's bookstores, continues. But the computer age and, more recently, the advent of the Internet are creating a new "electronic" marketplace in which both product and mode of delivery are assuming different forms. Increasingly competing for the consumer dollar with traditional paper versions of all manner of literature are works of similar content on-line, on CD-ROM, and on audio tape. More and more American consumers are supplementing their bedside paperback books with reference and other works read *and* viewed on computer monitors. And, while once Americans read, listened to music, and watched movies via discrete media, the emerging multimedia environment now combines these media into a single product capable of being delivered to consumers in CD-ROM format through commercial outlets

and on-line directly to their homes, via telephone lines linked to personal computers and coaxial cables connected to television sets. These transformations are occurring at a breathtaking pace, and AAP's members are eager participants in this exciting new marketplace.

INTEREST OF THE AMICUS AND SUMMARY OF ARGUMENT

This case is about government suppression of constitutionally protected speech on one node of the developing new media—cable television. Under the guise of protecting minors (persons under 18 years of age) from the allegedly harmful effects of "indecent" speech, Congress and the Federal Communications Commission (FCC) have established a regulatory regime which has as its avowed purpose, and will have as its indubitable effect, the "sanitizing" of certain cable channels which, ironically, were established by earlier government mandate to provide the public with maximally diverse program fare. The statutory and regulatory scheme here under examination would purge leased access cable channels of any content which, in the "reasonabl[e] belie[f]" of a cable system operator, contains "patently offensive" descriptions or depictions of sexual activities, as measured by "contemporary community standards," and would have the same impact on public-educational-government (PEG) access channels.

This is not the first effort on the part of Congress, the FCC, or the states to regulate "offensive" speech. Since this Court's emphatically narrow holding in *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 750 (1978), this country has seen a rapidly expanding regime of indecency regulations affecting many forms of media—a state of affairs never contemplated in 1978 when *Pacifica* was decided. This second tier of speech regulations, separate and apart from obscenity regulations, has developed largely unexamined by this Court.

It is particularly alarming to AAP's members that the Federal government would attempt to impose on one of the most important and promising of the new media—namely, cable television—a set of speech restrictions which greatly exceed in scope the extremely limited regulation of sex-related speech previously condoned by this Court. As noted, the manner of delivery of information to the American public is evolving at a rapid pace. The one-time universe comprising the arguably discrete worlds of "print" and "broadcast" is no longer. The worlds of print, broadcast, cable and, most recently, on-line and CD-ROM delivery are increasingly converging. AAP's book publisher members are committed to adapting to provide the same rich diversity of works to the consuming public by whatever avenues technology, and the demands of consumers, dictate. But regulatory approaches such as that here under examination, which treat new media more as speech threats than as speech opportunities, jeopardize the fulfillment of these First Amendment objectives.

The indecency standard at issue here is utterly vague. By purporting to cover anything depicting or describing sex or sexual organs which is "patently offensive" according to "contemporary community standards," it contains absolutely no terms susceptible of objective measurement. In practice, the provisions would substitute judgments as to majoritarian taste and personal morality for the constitutionally mandated tenets of pluralism and tolerance in matters relating to speech—the recognition that "one man's vulgarity is another's lyric." *Cohen* v. *California*, 403 U.S. 15, 25 (1971). The regulatory scheme is all the more objectionable given the fleeting nature of what, at any given time, in any given "community," may constitute "acceptable" program fare.

By forcing programmers and cable operators to guess at what constitutes "patently offensive" sexual material, the indecency provisions will, if upheld, undoubtedly achieve their invidious and unconstitutional goal of substantially rid-

ding most cable access channels of all non-obscene programming that conceivably might be thought to offend majoritarian sensibilities. Cable access programming will be reduced to a bland "lowest common denominator," thereby contravening not only the very purpose for which Congress mandated the existence of such channels in the first place, but also the First Amendment rights of cable programmers, cable operators, and viewers.

What cable programmer, for example, offering a feature on the current exhibition "Feminine/Masculine: The Sex of Art" at the Georges Pompidou Center in Paris—a major exhibition widely covered in the U.S. press which features Gustave Courbet's famous close-up of female genitals (*The Origin of the World*) and sexually-explicit works by virtually every major 20th-century artist—will be able to determine and certify with a reasonable level of certainty that the program is not "indecent"? Will a public forum program be able to feature a discussion of sex educational or AIDS prevention materials without fear of sanction? Will the soon-to-be launched BookNet cable programming service risk a reading of a chapter from Philip Roth's *Sabbath's Theater* (1995) (winner of the National Book Award), Vladimir Nabokov's *Lolita* (1955), or Marguerite Duras's *The Lover* (1984) (winner of France's esteemed Prix Goncourt)? Can it possibly be that such readings on the steps of the New York Public Library would be perfectly lawful but subject to censorship and sanction if rendered on a cable channel?

The import of permitting such vague speech restrictions to stand cannot be underestimated. Congress appears poised to enact, as part of its sweeping telecommunications reform legislation, provisions which would impose severe criminal penalties for the distribution of "indecent" material (defined in a virtually identical fashion as in the cable legislation at issue here) over any telecommunications device, *i.e.*, via any form of computer and embracing all manner of transmissions over the Internet. The resolution of this case and, in particular, the

extent to which this Court will allow constitutionally protected speech to be restricted based only on a majoritarian notion of "offensiveness," stands to have a direct effect not only on speech occurring through the medium of cable television, but on all manner of speech in the new media marketplace.

The unconstitutionality of the challenged provisions is manifest. This Court has prescribed the circumstances in which sexually-frank expression is subject to government regulation. *Miller* v. *California*, 413 U.S. 15 (1973), and its progeny set forth a tripartite test which features speech-sensitive protections utterly absent from the indecency standard challenged here. Perhaps most critically, the *Miller* obscenity test requires a showing that the work at issue, taken as a whole, lacks serious literary, artistic, political or scientific value. As Judge Wald aptly points out in her dissenting opinion below, the instant legislation has the perverse effect of targeting for censorship works whose "very merit will be inseparable from [their] 'offensiveness'." *Alliance for Community Media* v. *FCC*, 56 F.3d 105, 130 (D.C. Cir. 1995) (Wald, J., dissenting).

Nor can solicitude for minors' sensibilities justify so vague and overbroad a regulatory scheme. As this Court has observed, it is no answer to a hopelessly vague regulation "to say that it was adopted for the salutary purpose of protecting children." *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 689 (1968). Equally, where, as here, the effect of a regulatory scheme is to reduce the adult population's access to speech to solely that which is acceptable for children, its unconstitutional result is "to burn the house to roast the pig." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957).

The indecency regulations fail to survive constitutional scrutiny for reasons in addition to their vagueness. The challenged provisions are classic content-based regulations which presumptively violate the First Amendment. Along the lines recently suggested by Justice Kennedy in *Simon & Schuster*

v. *Members of the N.Y. Crime Victims Bd.*, 502 U.S. 105, 124-128 (1991) (Kennedy, J., concurring), AAP and its members would prefer that the Court conclude that such content-based restrictions on speech, falling outside of a few well-recognized exceptions, be held unconstitutional without need for further analysis. Should the Court instead continue to employ its strict scrutiny analysis, it should nevertheless find for the petitioners, since the government has failed to marshall evidence to establish that the challenged regulation is the least restrictive means of advancing a compelling state interest. By accepting the government's asserted interest at face value and by essentially defining the least restrictive means of achieving the government's goal as the *most effective* means, the court below robbed the strict scrutiny test of its power to protect free speech.

In this connection, AAP urges the Court to recognize that the technology that is fueling the development of the new media is also providing new means for protecting children from exposure to unsuitable material. Consortia of technology companies and content providers to the new media are devoting significant resources to this task. Rather than resort to the blunt and constitutionally flawed instrument of "indecency" regulation in an effort to balance speech interests with solicitude for minors, AAP urges that we allow the marketplace, committed parents, and the wondrous potential of new technology to arrive at solutions more consonant with our First Amendment traditions.

ARGUMENT[1]

I. THE ACT'S INDECENCY STANDARD IS UNCONSTITUTIONALLY VAGUE AND, AS A RESULT, THREATENS TO CHILL PROTECTED SPEECH

The definition of "indecent" in Section 10 of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (1992) (to be codified at 47 U.S.C. §§ 531, 532(h), and 532(j)) (the "Act"), and the regulations promulgated thereunder, is unconstitutionally vague. Section 10(a) of the Act, as implemented by the FCC, permits a cable operator to refuse to carry on leased access channels "indecent programming," which is defined as programming that the operator "reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Pub. L. No. 102-385, § 10(a), 106 Stat. 1486 (to be codified at 47 U.S.C. § 532(h); FCC regulations codified at 47 C.F.R. § 76.701(a) (1995)). Section 10(b) directs the Commission to adopt rules, which it has done, requiring cable operators which have not banned "indecent" programming—defined by the FCC as in section 10(a) but with the addition of the phrase "for the cable medium" at the end (47 C.F.R. § 76.701(g) (1995))—to segregate such programming, as identified by program providers, on a separate channel and block that channel unless the subscriber requests access in writing. Pub. L. No. 102-385, § 10(b), 106 Stat. 1486 (to be codified at 47 U.S.C. § 532(j)). The FCC regulations also require leased access programmers to identify whether any of their programming is indecent and to certify, at the operator's request, whether any or all of their programming is indecent or obscene. 47 C.F.R. § 76.701(d)

[1] AAP joins as well in the concerns addressed in the brief, *amici curiae*, submitted by American Booksellers Foundation for Free Expression, *et al.*

and (e) (1995). Furthermore, the FCC has interpreted section 10(c) to authorize cable operators to ban indecent material, as similarly defined, from PEG access channels (channels reserved for public, educational, or governmental use). 47 C.F.R. § 76.702 (1995). The definition of "indecent," therefore, pervades section 10 and the implementing regulations.

The Act's definition of "indecent" does not meet the governing constitutional standards. In particular, it is unconstitutionally vague. The due process doctrine of vagueness incorporates two basic principles. First, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *Smith* v. *Goguen*, 415 U.S. 566, 572 (1974); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961).[2] Second, a statute must provide explicit standards for those charged with its enforcement so as to prevent discriminatory application. *Grayned*, 408 U.S. at 108-09.

This Court repeatedly has emphasized that the vagueness doctrine applies with particular force in relation to regulations of constitutionally protected speech. As the Court stated in *Smith* v. *Goguen*, where a statute "is capable of reaching expression sheltered by the First Amendment, the [vagueness] doctrine demands a greater degree of specificity than in other contexts." 415 U.S. at 573.[3] Thus, where First Amendment

[2] *See also Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.").

[3] *See also Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982) ("If . . . the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603-04 (1967) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.") (*quoting NAACP*

interests are at stake, the Court has emphasized that "precision of drafting and clarity of purpose are essential." *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217-18 (1975). Such exactitude is necessary since "[u]ncertain meanings" inevitably lead citizens to " 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964) (*quoting Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). Vague regulations inhibit freedom of speech by forcing people to conform their speech to "that which is unquestionably safe." *Baggett*, 377 U.S at 372.

Examination of the language of the Act alone quickly reveals that its definition of indecency stunningly fails both objectives of the vagueness doctrine. The definition of indecency does not give cable programmers a reasonable opportunity to discern on which side of the line their programming falls, and, given its lack of precision, it necessarily invites discriminatory application by cable operators. The term is utterly and hopelessly vague by any measure, much less by the heightened standard applicable to regulations of speech. It is an entirely subjective term, containing no normative guideposts at all. *See Cramp*, 368 U.S. at 279, 286 (oath requiring Florida state employees to swear that they have never lent "aid, support, advice, or counsel or influence to the Communist Party" is "completely lacking in . . . terms susceptible of objective measurement").

Although "we can never expect mathematical certainty from our language" (*Grayned*, 408 U.S. at 110), "offensiveness" is merely a matter of personal taste, and the addition of the adjective "patently"—a word meaning little more than "very"—fails to add any meaningful definition. Nor does

v. *Button*, 371 U.S. 415, 432-33 (1963)); *Smith* v. *California*, 361 U.S. 147, 151 (1959) ("[S]tricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech; a man may the less be required to act at his peril here, because the free dissemination of ideas may be the loser.").

"contemporary community standards" provide any solid grounding. In this pluralistic society, with its many communities of widely varying social and political views—even within a given geographic area—there is no widespread consensus on what is offensive.

Moreover, in contemporary America, a great deal of sex-related speech which may long ago have been considered too risqué for popular consumption has since been absorbed by mainstream culture. For example, masturbation and birth control techniques are discussed on the popular network television sitcom "Seinfeld"; Dr. Ruth Westheimer has been a national celebrity for over a decade for her frank, informative discussions of sexuality on radio and television; unflinching larger-than-life close-up nude photographic self-portraits by John Coplans are accorded a special exhibition at the Museum of Modern Art in New York; a musical play featuring an all-nude cast—"Oh! Calcutta"—runs for years off-Broadway; and the publication of information concerning safe sex techniques to adults and minors alike has literally become a matter of life and death. Given the breadth and candor with which sexual subject matter has been treated by the mainstream media, who can reasonably judge what material constitutes non-obscene descriptions or depictions of "sexual or excretory activities or organs" that are "patently offensive"?

Curiously, the Act itself acknowledges the unworkable vagueness of the definition of indecency in its unusual provision allowing cable operators to ban programming they "reasonably believe[ ]" to be indecent. Since there is no way to determine with anything approaching objective certainty what *is* "patently offensive as measured by contemporary community standards," the statute explicitly incorporates the cable operator's subjective judgment as to what meets the definition. This language not only constitutes an admission of the lack of a discernible standard, it also creates further subjectivity and vagueness. *See Gay Men's Health Crisis* v. *Sullivan*, 792 F. Supp. 278, 295-96 (S.D.N.Y. 1992) (holding uncon-

stitutionally vague grant guideline for AIDS educational materials requiring that materials not be "offensive to a majority of the intended audience"; such a standard requires two levels of subjective analysis: a subjective judgment as to what a majority of other adults will think offensive).[4]

In addition to the actual language of the Act, this Court's precedents compel the conclusion that the Act's definition of "indecent" programming is unconstitutionally vague.[5] The Court has frequently struck down on vagueness grounds regulations of speech which similarly employ subjective standards because the language failed to provide sufficient

[4] *See also Big Mama Rag, Inc.* v. *United States*, 631 F.2d 1030, 1037 (D.C. Cir. 1980) (holding unconstitutionally vague an IRS regulation requiring officials to apply "an individualistic—and therefore necessarily varying and unascertainable—standard: the reactions of members of the public" to organizations' literature).

[5] Although the Court narrowly upheld an FCC ban on "indecent" language as applied in a particular factual context in *Pacifica*, AAP submits that *Pacifica* is not controlling, or even persuasive, here. First, the Court in *Pacifica* was not considering a facial vagueness challenge; rather, the limited issue before the Court was whether the repeated use of seven specific "filthy" words in an afternoon radio broadcast was indecent within the meaning of FCC regulations. *See Pacifica*, 438 U.S. at 742. Second, that decision, which turned upon the accessibility of radio broadcasts to children, *see Pacifica*, 438 U.S. at 746, has no bearing on cases involving cable television or other non-broadcast media. *See Sable Communications of California, Inc.* v. *FCC*, 492 U.S. 115, 125 (1989) (referring to *Pacifica* as an "emphatically narrow holding" that did not involve a total ban on indecent material and that emphasized the "unique" attributes of broadcasting); *Cruz* v. *Ferre*, 755 F.2d 1415, 1420 (11th Cir. 1985) (striking down city ordinance regulating distribution of "indecent material" through cable television and distinguishing *Pacifica* as focusing on broadcasting's "pervasive presence" and unique accessibility to children). Furthermore, the Court made clear that regulation of the seven "filthy" words would not be permissible on the ground that they were "offensive" and that, in the Court's view, their use was unrelated to the expression of ideas. By contrast, the indecency provisions under consideration here expressly incorporate what is essentially an "offensiveness" criterion and would prevent the effective communication of many ideas.

guidance either to those who would seek to comply or to those charged with enforcement. The unifying theme in these decisions is that speech can never be regulated in accordance with value judgments or subjective standards of taste or morality, regardless of the force of the government interest at stake—even where that interest purports to be the protection of children from exposure to harmful material.[6]

Thus, in *Interstate Circuit*, 390 U.S. at 689, the Court stated:

> Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of the power to regulate or control expression with respect to children.

The Court went on to quote the following portion of Chief Judge Fuld's concurring opinion in *People* v. *Kahan*, 15 N.Y.2d 311, 313 (1965):

> It is . . . essential that legislation aimed at protecting children from allegedly harmful expression—no less than legislation enacted with respect to adults—be clearly drawn and that the standards adopted be reasonably precise so that those who are governed by the law and those that administer it will understand its meaning and application.

Interstate Circuit, 390 U.S. at 689.

Several cases demonstrate this Court's demand for precision in speech regulations and its insistence that speech not be regulated in accordance with standards of taste or morality. In *Interstate Circuit*, for example, the Court upheld a vagueness

[6] *See Button*, 371 U.S. at 466 ("Laws that have failed to meet this [vagueness] standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms.") (Harlan, J., dissenting).

challenge to a city film licensing ordinance requiring a special license to show films deemed "not suitable for young persons" by a Motion Picture Classification Board despite the fact that the ordinance went to great lengths to define the term. The ordinance defined "not suitable for young persons" as *inter alia*:

> Describing or portraying nudity *beyond the customary limits of candor in the community*, or sexual promiscuity or extra-marital or abnormal sexual relations in such a manner as to be, in the judgment of the Board, likely to incite or encourage delinquency or sexual promiscuity on the part of young persons or to appeal to their prurient interest.

Interstate Circuit, 390 U.S. at 681 (emphasis added). The statute further defined a film "likely to incite or encourage" delinquency or sexual promiscuity on the part of young persons as one which will:

> create the impression on young persons that such conduct is profitable, desirable, acceptable, respectable, praiseworthy or commonly accepted

and further defined a film as appealing to "prurient interest" if

> its calculated or dominant effect on young persons is substantially to arouse sexual desire.

Id. at 681-82. In holding the statute unconstitutionally vague, the Court noted that:

> "[w]hat may be to one viewer the glorification of an idea as being 'desirable, acceptable or proper' may to the notions of another be entirely devoid of such a teaching. The only limits on the censor's discretion is his understanding of what is included within the term 'desirable, acceptable or proper.' This is nothing less than a roving commission . . . ."

Id. at 688 (*quoting Kingsley Int'l Pictures Corp.* v. *Regents of University of N.Y.*, 360 U.S. 684, 701 (1959) (Clark, J., concurring in result)). The very same dangers are presented by the "patently offensive" standard. What may be to one viewer a patently offensive depiction of sex may be to another an entirely "desirable, acceptable and proper" portrayal.[7]

In *Smith* v. *Goguen*, 415 U.S. 566, the Court likewise struck down as unconstitutionally vague a Massachusetts statute imposing civil or criminal sanctions for, *inter alia*, "treat[ing] contemptuously the flag of the United States." Noting that "[w]hat is contemptuous to one man may be a work of art to another," the Court held the statute void for vagueness for subjecting a defendant to criminal liability "under a standard so indefinite that police, court, and jury were free to react to nothing more than their own preferences for treatment of the flag." *Smith*, 415 U.S. at 578. *See also Cohen*, 403 U.S. at 25 ("one man's vulgarity is another's lyric").

The Act also does not differ in kind from the plainly unconstitutional statute at issue in *Coates* v. *Cincinnati*, 402 U.S. 611 (1971), which made it a criminal offense for persons assembled on sidewalks to conduct themselves in a manner "annoying" to persons passing by. "Offensiveness" is only a more extreme degree of disapproval than "annoyance"; both lack objective grounding. Thus, the Court's observation that "the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no

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[7] The *Interstate* Court also observed that rather than run the risk of misinterpreting the statute, a film exhibitor "might choose nothing but the innocuous" or "only the totally inane," 390 U.S. at 684—a concern which applies here as well. The Court further noted the following film licensing standards previously held by the Court to be unconstitutionally vague: "sacrilegious" (*Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495 (1952)); "immoral" and "tend to corrupt morals" (*Commercial Pictures Corp.* v. *Regents*, 346 U.S. 587 (1954)); and "such films as are cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals" (*Holmby Productions, Inc.* v. *Vaughn*, 350 U.S. 870 (1955)). *Id.* at 682-83.

standard of conduct is specified at all," *Coates*, 402 U.S. at 614, applies equally to this case.[8]

The vagueness of section 10's definition of "indecent" is further highlighted by comparing it to this Court's much struggled-over definition of obscene material. The definition of obscenity in *Miller*, 413 U.S. at 24, although necessarily subjective to some extent, is, in three respects, more precise than the Act's definition of "indecent": first, it requires appeal to the prurient interest; second, it requires that the sexual conduct depicted or described be "specifically defined" by the applicable state law; and third, it requires that the material lack serious literary, artistic, political, or scientific value. This last prong, in particular, provides significant protection and confines obscenity to somewhat discernible boundaries.Thus, an ironic and lamentable aspect of the Act's indecency standard is that it subjects programming which, unlike obscenity, *is* protected by the First Amendment, *Sable*, 492 U.S. at 125, to suppression on the basis of a far *less* clearly defined standard than that which the Court has developed for obscenity.

"[I]n the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression." *Miller*, 413 U.S. at 22-23. AAP submits that the inevitable censorship and self-censorship imposed by the Act's vague indecency standard on cable programmers and operators and, by inevitable extrapolation, on disseminators of information through the Internet and other electronic media, will stifle the transmission of a wide range of information of undeniable literary, artistic, political, and scientific value—a result utterly at odds with the First Amendment.

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[8] Moreover, as this Court repeatedly has made clear, the government "may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989). *See also Hustler Magazine* v. *Falwell*, 485 U.S. 46, 55-56 (1988); *Bolger* v. *Youngs Drug Prods. Corp.*, 463 U.S. 60, 71 (1983); *Pacifica*, 438 U.S. at 745; *Cohen*, 403 U.S. at 25.

In a world where modes of communication are expanding exponentially and distinctions between traditional forms of media already have begun to blur, the speech concerns raised by this case are not confined to program fare on cable access channels. Tomorrow's adults will be receiving much of their literature, poetry and scientific information through electronic means—including via coaxial cable, through their televisions, into the home. This changing reality presents great potential for promoting our First Amendment ideal of placing ever more diverse expression and points of view into a marketplace of ideas to which Americans have ready access. The new electronic marketplace cannot begin to reach its promise, however, if the expression to take place in it is to be sifted through an "indecency" filter.

II. THE "LEAST RESTRICTIVE MEANS" TEST, IF TRANSMUTED INTO A "MOST EFFECTIVE MEANS" TEST, WILL RESULT IN UNCONSTITUTIONAL SUPPRESSION OF PROTECTED SPEECH

The Act also must be struck down as an impermissible content-based regulation of speech. A fundamental principle of this Court's First Amendment jurisprudence is that content-based regulations of speech are highly disfavored and are subject to "the most exacting scrutiny." *Texas* v. *Johnson*, 491 U.S. 397, 412 (1989); *see also Simon & Schuster*, 502 U.S. at 115-16. *Turner Broadcasting Sys.* v. *FCC*, 114 S. Ct. 2445, 2459 (1994). Indeed, content-based regulations are presumptively invalid. *R.A.V.* v. *St. Paul*, 505 U.S. 377, 381 (1992).

> At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence . . . . Government action that stifles speech on account of its message . . . contravenes this essential right.

Turner, 114 S. Ct. at 2458. *See also Cohen*, 403 U.S. at 24. Therefore, "subject only to narrow and well-understood exceptions," the First Amendment "does not countenance govern-

mental control over the content of messages expressed by private individuals." *Turner*, 114 S. Ct. at 2458.

This case is compelling evidence of the threat of overreaching, imprecision, and the consequent unjustifiable suffocation of First Amendment rights when the government presumes to regulate speech on the basis of content. For this reason, AAP concurs with the view recently expressed by Justice Kennedy that a strict scrutiny analysis, which permits government regulation upon a showing that the statute serves a compelling state interest and is narrowly tailored to advance that interest, "has no real or legitimate place when the Court considers the straightforward question whether the State may enact a burdensome restriction of speech based on content only." *Simon & Schuster*, 502 U.S. at 124 (Kennedy, J., concurring).

Should the Court nevertheless continue to apply the strict scrutiny analysis outlined in *Sable*, 492 U.S. at 125, it should do so with vigilant concern for the First Amendment interests at stake. As an initial matter, the Court must require the government to demonstrate that its ends are compelling. Judge Wald's dissenting opinion below cogently exposes the shortcomings in the government's showing in this regard. *Alliance for Community Media*, 56 F.3d at 136-140 (Wald, J., dissenting).

In this case, the chief proponent in the Senate of the floor amendments that are codified as section 10 described their purpose as "putt[ing] an end to the kind of things going on" on access channels—a plainly unconstitutional purpose. 138 Cong. Rec. S652 (daily ed. Jan. 30, 1992). Moreover, section 10 was never considered in committee and was never the subject of congressional hearings or findings. Furthermore, Congress never justified its assumption that all programming that is "patently offensive" is actually *harmful* to children; this overbreadth in regulating casts further doubt upon the validity of the regulatory scheme. The willingness of the

majority below to approve such sweeping restrictions on speech on the basis of such a paltry demonstration of a compelling state interest represents an abdication of the judiciary's duty to guard against unwarranted government intrusions upon constitutionally protected rights.

In addition, in order to ensure that non-obscene speech relating to sex can be readily expressed, the "least restrictive alternative" prong of the strict scrutiny test must not be transformed into a "most effective alternative" test. Otherwise, it will be too easy for the government simply to impose the most draconian and burdensome restrictions on any number of the emerging and existing forms of communication, call them the most effective, and then argue that no other means are as effective in achieving the government's purpose. That transparently circular reasoning is precisely what the majority below approved in this case. *See Alliance for Community Media*, 56 F.3d at 125 (concluding that segregation and mandatory blocking "*most effectively* further the compelling interest in protecting children from indecent leased access programming") (emphasis added).[9] Such reasoning is forbidden by this Court's numerous precedents in which strict scrutiny has been employed, *see, e.g., St. Paul*, 505 U.S. 377; *Simon & Schuster*, 502 U.S. 105; *Johnson*, 491 U.S. 397; *Sable*, 492 U.S. 115, and would have a devastating impact on speech.

Finally, the majority below appears to have forgotten that the burden is on the government to show that its content-based regulation is the least restrictive means. *See, e.g., Sable*, 492 U.S. at 125. Thus, in *Sable*, the Court rejected a blanket ban on indecent interstate commercial telephone messages on the ground that "the congressional record contains

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[9] *Cf. Simon & Schuster*, 502 U.S. at 120 (noting with approval the observation of Judge Newman in his dissent below that by means of positing the *effect* of a statute as the government's interest " '[e]very content-based discrimination could be upheld by simply observing that the state is anxious to regulate the designated category of speech' ").

no legislative findings that would justify us in concluding that there is no constitutionally acceptable less restrictive means, short of a total ban, to achieve the Government's interest in protecting minors." *Id.* at 129.[10]

In this case, the majority below concluded that lockboxes and restrictions on the hours of programming were ineffectual means of advancing the government's interest based on nothing but a sheer assumption that viewers opting to use lockboxes would "inevitably" slip up or lapse and inadvertently expose children to indecent leased access programming (on isolated occasions) and that even if "indecent" programming were shifted to late night hours, some unsupervised children would have access to it. *Alliance for Community Media*, 56 F.3d at 124. As Judge Wald noted in dissent, however, nothing in the record supports the assumption that cable lockboxes are not an effective means of protecting children from indecent programming. To the contrary, both Congress and the FCC have found them effective. *Id.* at 140 (Wald, J., dissenting).

The majority's hypothetical and, in terms of impairment of the government's objective, wholly unquantified concerns regarding the alternatives cannot serve as a justification for the onerous burdens on speech imposed by section 10. Adequate solicitude for the First Amendment rights of transmitters and receivers of constitutionally protected "indecent" material demands more rigorous scrutiny of speech-restrictive regulations.

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[10] Even in relation to commercial speech regulations, to which the Court accords a lower level of scrutiny, the government bears the burden of demonstrating that the challenged regulation "advances the Government's interest 'in a direct and material way.' " *Rubin* v. *Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1995) (citation omitted) (striking down regulation barring inclusion of alcohol content on beer labels on ground that regulation did not "directly and materially advance" government interest in avoiding strength wars).

As earlier noted, technological solutions to concerns over minors' access to potentially unsuitable materials available in the electronic marketplace are in the offing. Such private sector solutions are constitutionally far more preferable than heavy-handed government regulation which impinges on adult access to constitutionally protected materials.

CONCLUSION

For the foregoing reasons, AAP urges the Court to hold section 10 of the Cable Television Consumer Protection and Competition Act of 1992 and its implementing regulations unconstitutional and reverse the judgment below.

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October Term, 1995

Denver Area Educational Communications Consortium, Inc., et al.,
Petitioners,
v.
Federal Communications Commission and United States of America,
Respondents,
and
Alliance For Community Media, et al.,
Petitioners,
v.
Federal Communications Commission and United States of America,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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No. 95-124
No. 95-227
(Consolidated)

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1995

Denver Area Educational Communications Consortium, Inc., et al.,
Petitioners,

v.

Federal Communications Commission and United States of America,
Respondents,

and

Alliance For Community Media, et al.,
Petitioners,

v.

Federal Communications Commission and United States of America,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENTS

INTEREST OF AMICUS

Morality in Media, Inc. ("Amicus"), as Amicus Curiae, files this brief in support of the Respondents in this case, which is before this honorable Court on the merits under the provisions of Rule 37(3)(a). The written consents of the petitioners and respondents have been requested and all parties have consented thereto in writing. Copies of these consents are being filed concurrently with this brief.

Morality in Media has a special interest in this case because it was the organization which suggested to Congress the need to restore to cable operators editorial control over "indecent" programming on leased and public access cable TV channels.[1] Amicus' proposal sprang from its experience in combatting indecent programming on the leased access channel in New York City, and from responding to complaints from other parts of the nation with similar problems on public and leased access channels.

Morality in Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states, and its Board of Directors and Advisory Board are composed of prominent businessmen, clergy and civic leaders.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along

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[1] *Cf.*, 138 Cong. Rec. S647-648 (daily ed. Jan. 30, 1992) (letter of Robert Peters of Morality in Media).

with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 note 4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality in Media participated as Amicus in *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115 (1989); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S.Ct. 1282 (1992); and in the case below, *Alliance for Community Media v. FCC*, 56 F.3d 105 (D.C. Cir. 1995).

Morality in Media is filing a brief in this matter in support of respondents because it believes that the problem of obscenity or indecency on cable TV access channels is growing and that the decision in this case will have a lasting effect on government's ability to effectively address the evil of cable obscenity and indecency. It is the belief of MIM, based on the briefs below, that its brief contains relevant matter that may not be brought to the attention of the Court by the parties, to wit that indecency on cable TV access channels is "nuisance speech" which is unprotected by the First Amendment and which can be prohibited to protect adults in the privacy of their homes and children.

SUMMARY OF ARGUMENT

In 1984, Congress required larger cable systems to provide leased access channels and authorized local franchise authorities to require public access channels on all

systems. In addition, Congress prohibited cable operators from exercising "editorial control" over these channels, but to prevent these channels from becoming conduits for porn and other indecent material, Congress also empowered franchising authorities to prohibit or restrict indecency.

Unfortunately, Congress' decision to prevent cable operators from exercising "editorial control" resulted in many access channels becoming conduits for porn and other indecent programming. In Subsections 10(a) & (c) of the Cable TV Consumer Protection and Competition Act of 1992, Congress removed the barriers preventing operators from exercising "editorial control" over indecency. In doing so, it did not engage in prohibited "state action."

Recognizing that some operators may carry indecent or obscene material, Subsection 10(b) requires that indecent programs be placed on restricted access channels, and Subsection (d) removes operator immunity for carriage of obscene material. The purpose of these Subsections was to protect, as much as Congress thought possible, children and the American people against indecent or obscene programming--not to coerce or "significantly encourage" cable companies to "ban" indecency.

In 1984, Congress also preempted states and local authorities from imposing "requirements" regarding the "content of cable services." What was then preempted, cannot again be preempted by the Act at issue in this case.

This Court should not rush to conclude that privately owned cable TV channels have been designated "public forums," particularly when these "forums" intrude into the home and are easily accessible to children.

Indecency on cable TV leased access channels,

which intrudes uninvitedly into the home, assaulting unwilling adults and providing easy access to children, is a form of "nuisance speech" which, like broadcast indecency, is unprotected by the First Amendment and can be prohibited. Section 10(b) is, therefore, constitutional.

Applying the indecency standard to cable TV access channels will not reduce adults to viewing only that which is fit for children, since adults in the privacy of their homes also have a right to not be assaulted by indecent programming, and the "indecency" standard is determined not by what is "harmful to minors" but rather by what is "patently offensive," when applying community standards.

Finally, the "indecency" standard is not vague or overbroad, as this Court held in *FCC v. Pacifica*. To be indecent, programming must be "patently offensive," when applying community standards. "Time of day" and "serious value" are also "variables" to we weighed in determining whether programming is "indecent."

ARGUMENT

I

SECTION 10 DOES NOT CONVERT A CABLE OPERATOR'S DECISION TO PROHIBIT INDECENT PROGRAMMING ON PRIVATELY OWNED CHANNELS INTO 'STATE ACTION'

In January 1992, Senator Helms introduced an amendment to the Cable TV Consumer Protection and Competition Act of 1992 ("Cable Act of 1992"), which removed the legal barrier to the exercise by cable operators of editorial control over "indecent" material on cable TV *leased* access channels.[2] In addition, the Helms'

[2] Section 10(a) of Cable Act of 1992.

amendment required cable operators to put indecent programming, they choose to carry, on a blocked channel[3]. Other amendments were introduced (1) to allow operators to exercise editorial control over indecency on *public* access channels[4] and (2) to do away with operator immunity from liability for carrying obscenity on all access channels.[5]

Petitioners in case No. 95-227 (i.e., Alliance for Community Media, Alliance for Communications Democracy and People for the American Way, hereinafter "Petitioners AAP") argue that this statutory scheme (i.e., Section 10 of the Cable Act of 1992) on its face "disadvantages certain disfavored speech based solely on the speech's content."[6]

The concern in *Turner Broadcasting System v. FCC*,[7] however, was "laws that by their terms distinguish favored speech from disfavored speech on the basis of ideas or views." In FCC v. Pacifica Foundation,[8] this Court stated that indecency is at the "periphery of First Amendment concern" and that restrictions on indecent speech have their "primary effect on the form, rather than the content, of serious communication."

Clearly, Congress can prohibit indecent speech in

[3] Section 10(b) of the Cable Act of 1992.

[4] Section 10(c) of the Cable Act of 1992.

[5] Section 10(d) of the Cable Act of 1992.

[6] Pet. AAP Br. at 18.

[7] 62 LW 4647, 4652 (U.S. 1994)

[8] 438 U.S. 726, at 743, including note 18 (1978).

some contexts,[9] and Amicus contends that it is also clear from the legislative history and provisions of the Cable Communications Policy Act of 1984 (hereinafter "Cable Act of 1984"), that when Congress prohibited cable operators from exercising "editorial control" over access channels, it also empowered franchising authorities to prohibit or restrict cable services which are indecent.

Subsection 612(h)[10] of the Cable Act of 1984, pertaining to "leased access" channels, specifies that:

> (h) Any cable service offered pursuant to this section shall not be provided, or shall be provided subject to conditions, if such cable service in the judgment of the franchising authority is obscene, or is in conflict with community standards in that it is...indecent or is otherwise unprotected by the Constitution. [Emphasis added]

Of Subsection 612(h), the Report of the House Committee on Energy and Commerce[11] stated:

> "Subsection 612(h) addresses an issue of particular concern to the Committee--the potential availability of obscene or otherwise Constitutionally unprotected programming over cable systems."

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[9] See, e.g., *FCC v. Pacifia Foundation*, 438 U.S. 726, 732 (1978) (affirming FCC order that the "Filthy words" monologue at issue "as broadcast was indecent and prohibited by 18 U.S.C. 1464"); *Hustler Magazine v. Falwell*, 56 LW 4180, 4182 (1988) (citing *Pacifica* for the proposition that regulation of indecent expression is an "exception to the general First Amendment principles").

[10] 47 U.S.C. 532(h).

[11] H.R. Rep., No. 98-934, 98th Cong., 2d Sess., p. 55 (1984) (hereinafter "House Report").

The similar phrase "otherwise unprotected by the Constitution" is also found in Subsection 624(d)(1)[12] of the Cable Act of 1984, which applies to programming on both public and leased access channels, and which permits franchising authorities to specify, in a franchise that:

> "[C]ertain cable services shall not be provided or shall be provided subject to conditions, if such cable services are obscene or otherwise unprotected by the Constitution."

Amicus would contend that Subsection 624(d)(1) was intended to allow franchising authorities to prohibit or restrict "indecent" cable TV programming--*to the extent this Court permits it*. As noted in the House Report:

> This provision would also permit changing constitutional interpretations to be incorporated into the standard set forth in 624(d)(1), should those judicial interpretations at some point in the future deem additional standards, such as indecency, constitutionally valid as applied to cable...The Committee recognizes with respect to cable the need to provide for the restriction, within constitutionally permissible grounds, on the availability of programming, which might not be obscene, but is nonetheless indecent, if children are going to be adequately protected from exposure to such material.[13] [Emphasis supplied]

Neither children nor society, however, were

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[12] 47 U.S.C. 544(d)(1).

[13] House Report, at 69-70; see also 130 Cong. Rec. S14288-14289 (daily ed. Oct. 11, 1984) (statement of Sen. Goldwater that phrase "other similar laws" encompassed indecency.)

"adequately protected" by the Cable Act of 1984 from obscene or indecent programming on access channels, and Congress should not now be prevented from providing much needed protection, because in 1984 it mistakenly believed that it had adequately addressed the problem.[14]

Furthermore, the First Amendment was intended to protect against incursions *by the Government*, and not by private persons, and a cable operator's right to not transmit "indecent" speech should not depend on whether or not the state or Federal government has, in the past, forced it to provide access for such speech.[15]

Petitioners AAP also argue that since some states and franchising authorities had denied cable operators

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[14] *Cf.*, Statement of Senator Wirth in support of Subsection 10(c) of the Cable Act of 1992. 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992). Senator Wirth, who authored the public access channel provisions of the Cable Act of 1984, stated that the purpose of these channels was to "make sure" that cable operators could not "shut out all kinds of public programming." He went on to say, however:

> But, clearly, that has now been abused. Any of us who have been to New York City recently and looked on the television set..will see this is true. Time-Warner has no choice; I mean, they have to provide this kind of access for what essentially has nothing to do with any kind of public interest whatsoever. It is the most prurient, in fact, in many ways, grossly illegal access one could imagine...So I hope that all of us will support the Fowler amendment and give a very clear signal to the cable companies that, in fact, they can police their own systems, which they cannot do now. This is a service not only to the public, but, also, to the cable companies themselves.

[15] While phone companies in some states can choose to deny services to "dial-a-porn" companies [see *Carlin Com., Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352 (11th Cir. 1986)], companies in other states are not permitted to do so -- and may never be able to do so if Petitioners' "state action" views prevail.

editorial control over indecent programming *before* Congress passed the 1984 Cable Communications Policy Act, Congress did not "restore" to cable operators their editorial control because the operators "never had the discretion in the first place."[16]

Amicus would argue that there is a difference between a person who does not have a constitutional right to begin with (e.g., to shout "fire"' in a crowded theater), and *one who does have a constitutional right but who is prevented by government from exercising it*. If a state enacts a law prohibiting cable operators from exercising "editorial control" or, pursuant to a franchise agreement, an operator agrees to not exercise editorial control, the cable operators do not lose their constitutional rights--or never have them "in the first place." Just as government prevented the exercise of these rights, it can remove the barriers to their exercise and, in effect, "restore" them.

Petitioners AAP also argue that Section 10 constitutes "state action" because it preempts all state laws and franchising agreements.[17] Subsection 624(f)(1)[18] of the Cable Act of 1984, however, already preempted States and local authorities from imposing "requirements regarding the...content of cable services, except as expressly provided."[19] Nowhere does the Cable Act of 1984 expressly provide that states or franchising

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[16] Pet. AAP Br. at 23.

[17] Pet. AAP Br. at 24-27.

[18] 47 U.S.C. 544(f)(1).

[19] *Cf., Community Television v. Wilkinson*, 611 F.Supp 1099, 1102-1103 (D.C. Utah 1985).

authorities can require cable operators to carry "indecent" programming. On the contrary, it is clear from the legislative history and from provisions within the Cable Act of 1984 that Congress did not intend or desire that access channels become protected havens for indecency.

Nor do Sections 636 and 637[20] of the Cable Act of 1984 "expressly" provide that cable operators can be required to carry indecent programming. Given the policy expressed in Subsections 612(h) and 624(d)(1)(2) *against* carriage of indecency, Amicus would argue that these Sections preempt any state law or franchise provision which would require carriage of indecent programming on access channels. Clearly, if states and franchising authorities were preempted by the Cable Act of 1984, they cannot again be preempted by the Cable Act of 1992.

Petitioners AAP also argue that state action is present because Section 10 "significantly encourages" the "underlying private conduct."[21] For Congress, however, to do all that it believed it could do constitutionally to address the problem of obscene or indecent programming on public and leased access channels, does not add up to a plan or scheme to "ban indecent speech on access channels"[22] or to "compel censorship."[23]

Government often imposes burdens on the exercise of a right. For example, the Federal "Dial-A-Porn" statute

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[20] 47 U.S.C. 556 and 557.

[21] Pet. AAP Br. at 27.

[22] Pet. AAP Br. at 28.

[23] *Id.* at 29.

requires telephone companies that provide billing services to providers of "indecent" messages to block access to such messages from the telephones of subscribers who have not in writing requested access.[24] Communities also restrict the location and operation of "adult uses." Compliance can be costly, but a person's decision to not open an "adult use" is not thereby converted into "state action." Nor are such private decisions converted into "state action" by obscenity laws or by the statements of some legislators, who would prefer that "sexually oriented businesses" not open at all in their communities.[25]

In enacting Section 10 of the Cable Act of 1992, Congress removed a barrier it had imposed on the right of cable operators to exercise editorial control over indecent material on access channels. It did so, not to encourage cable operators to ban indecent programming, but because it had every reason to believe that most, if not all, cable operators were carrying such material against their will.[26]

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[24] 47 U.S.C. 223(c)(1).

[25] See, e.g., *City of Renton v. Playtime Theatres, Inc.*, 106 S.Ct. 925, 929 (1986); *United States v. O'Brien*, 391 U.S. 367, 383-384 (1968)("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive...What motivates once legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it....").

[26] *Cf.*, Statement of Sen. Wirth, quoted above at p. 8. See also, **"Bill to Limit 'Offensive' Cable TV Programs Introduced in Albany,"** *N.Y. Times*, 5/28/81 (article notes that sponsor of bill to give cable companies "greater control" over public access channels to prevent "'proliferation of pornography'" was joined at a news conference by representatives of "one of two Manhattan cable franchises."); and **"Cable ads 'within law,'"** *N.Y. Post*, 2/12/87 (article quotes Manhattan Cable TV general counsel as saying that lack of editorial control over

Congress also required cable operators, who choose to carry indecency on leased access channels, to put it on a blocked channel. It did so, not to encourage cable operators to ban indecent programming, but rather to protect children if the cable operators choose to carry it.[27] Finally, Congress stripped cable operators of immunity from liability for carrying obscenity on leased/public access channels. It did so, not to encourage operators to ban indecency, but to discourage carriage of obscenity.[28]

Petitioners AAP also argue that "public access" channels are a "public forum."[29] Amicus would urge this Court to not rush to conclude that either local franchising authorities or Congress have transformed channel space on a privately owned cable system into a "public forum," particularly when the "forum" intrudes into the privacy of the home and is uniquely accessible to children.[30]

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sexually oriented ads on leased channels was a "situation Manhattan Cable is not particularly happy to be in").

[27] 138 Cong. Rec. S646-647 (daily ed. Jan. 30, 1992) (statement of Senator Helms); *Id.* at S648-649 (statement of Sen. Coats).

[28] See, e.g., *Playboy Enterprises v. Public Service Com'n of P.R.*, 698 F.Supp. 401 (D. Puerto Rico 1988); **"DA, Prompted by Koch, Probes Late Night Sex Telecasts,"** *N.Y.C. Tribune*, 12/8/89 (article describes letter from NYC Mayor Koch asking district attorney to investigate "pornographic cablecasts" on Manhattan Cable TV's "leased access" channel that "may be obscene under state or federal law.").

[29] Pet. AAP Br. at 32-33.

[30] Furthermore, even in a "public forum," obscenity, harmful to minors and public indecency laws apply, and as this Court has held, "indecent" speech, which may be constitutionally protected outside the home, can be regulated when it intrudes into the privacy of the home and is accessible to children. *Pacifica*, at 438 U.S. 749, n.27.

Amicus would also argue that it is one thing to require persons to dedicate private property, which they do not use for communicative purposes (e.g., telephone poles or sidewalks in front of mall stores), for "public use," and another thing to require persons to "dedicate" valuable TV channels for "public indecency." Required access channels have often deprived viewers of quality programming.[31]

II
CABLE TV INDECENCY WHICH INTRUDES INTO THE HOME, ASSAULTING UNWILLING ADULTS AND PROVIDING EASY ACCESS TO CHILDREN, IS A FORM OF 'NUISANCE SPEECH' WHICH CONGRESS CAN PROHIBIT

A. 'Nuisance Speech' Is a Category of Speech Outside First Amendment Protection.

This Court has often stated that there are narrowly limited classes of speech which are not protected by the First Amendment. Amicus contends that one such class is "nuisance speech" and that "indecent" speech which, by means of cable TV access channels, assaults unwilling adults in the privacy of the home and is easily accessible to children, is a form of "nuisance speech"[32] which Congress

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[31] See, e.g., **"Cable runs out of room,"** *N.Y. Post*, 7/17/95 (article notes that there is no space on Time Warner's Manhattan cable system for "Turner Classic Movies" and the "History Channel," in part because Time Warner is required to carry four "public access" channels).

[32] *Cf.*, 50 *Am. Jur. 2d* Lewdness, Indecency pp. 484-485 ("use of indecent language...under certain circumstances...considered a nuisance."); *Am. Jur. Proof of Facts*, Vol. 8, p. 530 (1960): ("[A] nuisance may be established by showing that the thing involved violates the laws of decency; and a showing of hurt to moral sensibilities is deemed sufficiently substantial to justify judicial interposition.").

can constitutionally prohibit.[33]

The concept of "nuisance speech," as a class of speech unprotected by the First Amendment, was first alluded to by this honorable Court in *Chaplinsky v. New Hampshire,*[34] where the Court stated:

> There are certain, well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene...those which by their very utterance inflict injury or tend to incite an immediate breach of the peace...[S]uch utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[35]

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[33] Amicus does not say that indecency is unprotected in every medium or context. *Cf. Pacifica*, 438 U.S. 726, at 746 ("We may assume, arguendo, that this monologue would be protected in other contexts."). Time of day is one variable to be considered. *Id.* at 750.

[34] 315 U.S. 568 (1942).

[35] *Id.* at 571-572. Amicus says "alluded to" because the above quoted material, while not specifically mentioning nuisance speech, twice cites the book *Free Speech in the United States*, by Zechariah Chafee, Jr. (1941), which does so at pp. 149-150:

> But the law also punishes a few classes of words like obscenity, profanity...because the very utterance of such words is considered to inflict a present injury upon listeners, readers...This is a very different matter from punishing words because they express ideas thought to cause future danger to the state...[P]roperly limited they fall outside the protection of the free speech clauses...[P]rofanity, indecent talk and pictures, which do not form an essential part of any exposition of ideas, have a very slight social value as a step toward truth, which is clearly outweighed by the social interests in order, morality, the training of the young and the peace of mind of those who hear or see...The man who swears in a street car is as much of a *nuisance* as the man who smokes there. [Emphasis supplied]

In *Breard v. Alexandria*[36] and *Kovacs v. Cooper*[37] this Court upheld nuisance ordinances aimed at means of communication that intrude uninvitedly into the privacy of the home and, in *Hess v. Indiana,*[38] this Court identified speech that amounts to a public nuisance as outside the protection of the First Amendment:

> It hardly needs repeating that '[t]he...guarantees of freedom of speech forbid the States to punish the use of words or language not within 'narrowly limited classes of speech.'...Hess' words could [not] be punished as obscene...By the same token, any suggestion that Hess' speech amounted to 'fighting words'...could not withstand scrutiny... In addition, there is no evidence to indicate that Hess' speech amounted to a public nuisance in that privacy interests were being invaded.[39] [Emphasis added]

The public nuisance rationale was also applied by

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[36] 341 U.S. 622 (1951).

[37] 366 U.S. 77 (1949).

[38] 414 U.S. 105 (1973).

[39] *Id.* at 107-108. *Cf. Redrup v. New York*, 386 U.S. 767, 769 (1967) and *Close v. Lederele*, 424 F.2d 988, 990 (1st Cir. 1970), *cert. den.*, 400 U.S. 903 (1970), both of which recognize a need for government protection against an "assault upon individual privacy."

three Justices writing in dissent in *Rosenfeld v. New Jersey*[40]. Justice Powell, with whom the Chief Justice and Mr. Justice Blackmun joined, wrote:

> But the exception to the First Amendment protection in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willful use of scurrilous language calculated to offend the sensibilities of an unwilling audience...[A] verbal assault on an unwilling audience may be so grossly offensive and emotionally disturbing as to be the...subject of criminal proscription, whether under a statute denominating it disorderly conduct, or, more accurately, a public nuisance...The Model Penal Code...also recognizes a distinction between utterances which may threaten physical violence and those which may amount to a public nuisance, recognizing that neither category falls within...First Amendment [protection].[41] [Emphasis added]

In *Bethel School District No. 403 v. Fraser*[42], this Court held that a student could be penalized for making an indecent speech before a school assembly, attended by students and faculty, in violation of a school rule. Justice Stevens dissented on due process grounds, but also noted:

> [A] 'nuisance may be merely a right thing in the wrong place,--like a pig in the parlor instead of the barnyard...Vulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others...It seems...obvious that [the] speech would

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[40] 408 U.S. 901 (1972).

[41] *Id.* at 408 U.S. 905-906.

[42] 478 U.S. 675 (1986).

> be inappropriate in certain...settings."[43]

The concept of "nuisance speech" was also applied to TV in *FCC v. Pacifica Foundation.*[44] In *Pacifica*, this Court, in affirming an FCC ruling that the Carlin monologue, "Filthy Words," as broadcast was indecent and prohibited by 18 U.S.C. 1464, observed that the FCC decision "rested entirely on a nuisance rationale under which context is all important" and compared indecent broadcast to a "pig in a parlor instead of the barnyard."[45] The Pacifica Court also stated that special regulation of broadcast indecency was justified because it "confronts the citizen, not only in public, but also in the privacy of the home" and because it is "uniquely accessible to children."[46]

Amicus contends that *Pacifica* must be read consistent with the line of cases cited above, which treat "nuisance speech" as unprotected. Amicus also contends that indecency on cable TV access channels, which intrudes into the home, assaulting unconsenting adults and providing easy access to children, also amounts to a "nuisance" and is unprotected by the First Amendment.[47]

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[43] *Id.* at 696.

[44] 438 U.S. 726 (1978); see also *Tallman v. United States*, 465 F.2d 282, 285-286 (7th Cir. 1972).

[45] *Id.* at 750.

[46] *Id.* at 748-749. Justice Powell, concurring, specifically agreed that protecting adults was a valid concern. Id. at 759-760

[47] If Amicus' is correct that "nuisance speech" is unprotected, then "strict scrutiny" is not the level of scrutiny to be applied. *Cf., City of Dallas v. Stanglin*, 109 S.Ct. 159, 57 LW 4406, 4407 (1989): "Unless laws 'create suspect classifications or impinge upon constitutionally

B. Cable TV Indecency Is Just As Much a 'Nuisance' As Broadcast Indecency And Can Be Prohibited By Congress

While it is true that cable viewers elect to have cable installed and pay a monthly fee, it is also true that broadcast viewers elect to pay for the TV, have an antenna installed and support the programming by buying the products advertised. It does not follow that either desire or "elect" to have indecent programming dumped into their living rooms or have their children exposed to it.

Amicus would also point out that in over 60 percent of American homes, broadcast programming now enters the home via a cable TV wire as a part of the basic cable package, and cable viewers do not have any more control over the rest of the basic package, which includes public and leased access channels, than they do over the broadcast programming. A "pig" which comes uninvited into the parlor via a cable TV wire is just as offensive to unwilling adults and accessible to children as the same "pig" which enters the home directly "over the airwaves."

If broadcast indecency constitutes a "nuisance," which Congress can prohibit, then indecency on cable TV access channels, to the extent that it invades the privacy of the home and is accessible to children, is also a "nuisance,"[48] which Congress can prohibit. Section 10(b)

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protected rights,'...it need only be shown that they bear 'some rational relationship to a leg itimate state purpose.'"

[48] *Cf.*, op ed article Goodbye, Channel J -- and Good Riddance, *N.Y. Times*, 9/29/90, by Gilbert T. Sewall, describing programming on Manhattan's leased access "Channel J" as "hard-core sex programming" and as being one of New York's "real public nuisances."

is, therefore, a lawful exercise of the legislative power.[49]

C. The Summary Affirmance in Wilkinson v. Jones *Does Not Prevent This Court from Upholding The Regulation of Indecency at Issue Here.*

In *Wilkinson v. Jones,*[50] this Court, over the objection of the Chief Justice and Justice O'Connor, summarily affirmed a decision of the Tenth Circuit which, in a per curiam opinion,[51] had affirmed a decision of the district court of Utah[52] invalidating a Utah cable TV indecency act. The Court of Appeals' affirmance was based on "the reasons stated" by the district court, which had held that the Utah Act was preempted by Federal law and was "unconstitutionally overbroad and vague, and void on its face."[53] Circuit Judge Baldock, who agreed the law was overbroad and vague, nevertheless concluded in a concurring opinion "that the *Pacifica* rationale for the regulation of indecency applies to cablecasting."[54]

While a summary affirmance is a ruling "on the

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[49] *Cf., Kovacs*, 336 U.S. 77, at 85 ("We need not determine whether this ordinance...is regulatory or prohibitory. All regulatory enactments are prohibitory so far as their restrictions are concerned.").

[50] 480 U.S. 926 (1987).

[51] *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986).

[52] *Community Television of Utah, Inc. v. Wilkinson*, 611 F.Supp. 1099 (D.Utah 1985).

[53] 611 F.Supp at 1105, 1117.

[54] *Jones v. Wilkinson*, 800 F.2d 989, at 1006.

merits"[55] and does prevent lower courts from "coming to opposite conclusions on the precise issues presented and necessarily decided" by the action,[56] it does not have the same precedential value as does an opinion of the Supreme Court "after briefing and oral argument on the merits"[57] and should not be read as necessarily adopting the reasoning of the lower court whose judgement is appealed[58] or understood "as breaking new ground, but as applying principles established by prior decisions *to the particular facts involved.*"[59]

How then should this Court's summary affirmance of the Tenth Circuit's per curiam opinion in *Wilkinson v. Jones, supra* be understood? While dicta or overbroad language in the district court's opinion has prompted assertions that it rests on a determination that the First Amendment prevents government prohibitions on all nonobscene cable programming, the district court decision could rest on several grounds and should not be read as establishing the broadest constitutional principle.[60]

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[55] *Hicks v. Miranda,* 422 U.S. 332, 344 (1975).

[56] *Mandel v. Bradley,* 432 U.S. 173, 176 (1977).

[57] *Edelman v. Jordan,* 415 U.S. 651, 657 (1974); *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 476, n.20 (1979).

[58] *Mandel v. Bradley,* 432 U.S. at 176.

[59] *Id.* at 176.

[60] In *Wilkinson v. Jones,* the first question presented by Appellant's Jurisdictional Statement [*cf.* 55 L.W. 3577] was the following: "(1) Does First Amendment deny government any power to restrict public dissemination of indecent material on cable television in any circumstances?" In their Motion To Affirm [at p. 20], however, the

By summarily affirming, this honorable Court provided no indication of the rationale of the Court in affirming or of the Justices that voted to affirm. Some or all of the justices could have concluded that the Utah statute as such was preempted or was vague or overbroad (and therefore curable), without actually deciding Appellant's broad constitutional issue as phrased in question (1) above.

The "precedential significance" of a summary decision must be assessed in light of all the facts in that decision and that where the facts of a subsequent case are "very different," lower courts must make an "independent examination of the merits" in the new case.[61] Clearly then, the summary affirmance in *Wilkinson* does not foreclose the Court itself from addressing here the validity of very different federal Cable TV indecency legislation.

III
APPLYING THE INDECENCY STANDARD TO CABLE TV ACCESS CHANNELS WILL NOT REDUCE ADULTS TO VIEWING ONLY WHAT IS FIT FOR CHILDREN.

Petitioners AAP argue that Section 10 would reduce adults to viewing only that which is fit for children.[62] While protecting children may have been Congress' primary concern, however, Amicus would contend that it wasn't

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Appellees argued that: "Appellant not only asks the Court to abstract from this case the broadest constitutional issue raised...but to disregard the other necessarily attendant issues that make clear that this statute is infirm on narrower constitutional grounds."

[61] *Mandel v. Bradley,* 432 U.S. at 177.

[62] Pet. AAP Br. at 37.

the only concern. In introducing his amendment,[63] Senator Helms said: "consumers have the right to reject such programming from being fed into their homes" [emphasis added] and then quoted from a mother's letter:

> Words cannot describe the outrage I felt when I found myself watching on cable TV a couple engaging in oral sex...I feel as though my daughter and I are subject to verbal and visual violation just by...pushing the wrong button.[64] [Emph. added]

In introducing his amendment to restore to cable operators editorial control over "sexually explicit conduct," obscenity and solicitation for prostitution on *public* access channels, Senator Fowler did not mention children.[65]

Amicus would argue that the "indecency" concept is linked to what offends societal standards of propriety and

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[63] Section 10(a)(b). In 1988, when Senator Helms introduced an amendment to prohibit indecent broadcast, he clearly intended it to protect not just children but all Americans. See, Cong. Rec. S.9911-9913 (daily ed. July 26, 1988). In 1991, however, a panel of the D.C. Circuit invalidated that amendment and, in the process, indicated that the only valid governmental interest was protection of children. *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991).

[64] 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992). In support of the Helms amendment, Senator Thurmond also stated at S648:

> [T]his pornography is entering the privacy of another's home completely unsolicited. Furthermore, children cannot be monitored every minute of the day. [Emphasis added]

[65] 138 Cong. Rec. S649 (daily rec. Jan. 30, 1992) (statement of Sen. Fowler). Senator Wirth, who authored the provisions of the Cable Act of 1984 pertaining to public access channels, also did not mention children in his statement of support for the Fowler amendment. 138 Cong. Rec. S.650 (daily rec. Jan. 30, 1992) (statement of Sen. Wirth).

morality and is determined by community standards--not solely by what is deemed "harmful to minors."[66] In *Roth v. United States*,[67] this honorable Court stated:

> "This Court, as early as 1896, said of the Federal Obscenity statute: '...Every one who uses the mails...must take notice of what...is meant by decency...in social life.'" [Emphasis added]

In *Manual Enterprises, Inc. v. Day*,[68] Justice Harlan stated that indecency (viz. "patent offensiveness") involves application of community standards:

> "The words...'obscene, lewd, lascivious, indecent, filthy or vile,' connote something that is portrayed in a manner so offensive as to make it unacceptable under current community mores...[T]he statute reaches only indecent material...."

In *FCC v. Pacifica Foundation*, this honorable Court stated that the "normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."[69] In *Bethel School District No. 403 v. Fraser*,[70] this Court noted that members of Congress were prohibited from using "indecent language against the proceedings of the House," and also stated:

> "[S]chools must teach by example the shared values of a civilized social order....The pervasive sexual

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[66] See, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968).

[67] 354 U.S. 476, at 491, n.28 (1957).

[68] 370 U.S. 478, at 482 (1962).

[69] 438 U.S. 726, at 740.

[70] 478 U.S. 675, at 682 (1986).

innuendo in [the student's] speech was plainly offensive to...teachers and students--indeed to any mature person."[71] [Emphasis added]

In *Barnes v. Glen Theatre,*[72] this honorable Court upheld an Indiana statute prohibiting "Public Indecency." In so doing, Chief Justice Rehnquist noted:

"Public indecency statutes of this sort...reflect the moral disapproval of people appearing in the nude among strangers in pubic places....Thus the public indecency statute furthers a substantial government interest in protecting order and morality."[73]

Nor has this honorable Court said that Congress may only regulate indecency to protect children. Mr. Justice Stevens, who delivered the opinion of the Court, with respect to Part IV-C, in *Pacifica*, described one attribute of the broadcast media which justifies restricting indecency:

"[T]he broadcast media have established a uniquely pervasive presence in the lives of all Americans. Patently offensive, indecent material presented over the airwaves confronts the citizen...in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder...[P]rior warnings cannot completely protect the listener or viewer from unexpected program content."[74] [Emphasis added]

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[71] *Id.* at 683.

[72] 501 U.S. 560 (1991).

[73] *Id.* at 568-569.

[74] 438 U.S. 726, at 748-749.

In *Frisby v. Schultz,*[75] this Court described the "interest" in protecting the well-being, tranquility, and privacy of the home as being "certainly of the highest order in a free and civilized society." The Court then stated:

"One important aspect of residential privacy is protection of the unwilling listener. Although in many locations we expect individuals simply to avoid speech..., the home is different....Thus, we have repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that government may protect this freedom. See, e.g., *FCC v. Pacifica*, 438 U.S. 726, 748-749 (1978)...; id., at 759-760 (Powell, J. concurring in part and concurring in judgement)."[76]

In *Sable Communications of California, Inc. v. FCC,*[77] the sole issue, as framed by the parties, was whether a ban on indecent dial-a-porn messages could be justified solely on a protection of minors rationale. This Court said "No," but noted:

The private...telephone communications at issue here are substantially different from the public radio broadcasting at issue in *Pacifica*....Callers will generally not be unwilling listeners. The context of dial-in services...is manifestly different from a situation in which a listener does not want the received message. Placing a phone call is not the

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[75] 487 U.S. 474, at 484 (1988).

[76] *Id.* at 484-485. See also, *People v. Starview Drive-In Theatre,* 427 N.E.2d 201 (Ill. App. Ct. 1981), *appeal dism'd sub nom., Starview Drive-In Theatre, Inc. v. Cook Co.,* 457 U.S. 113 (1982).

[77] 492 U.S. 115 (1989).

same as turning on a radio and being taken by surprise...[78] [Emphasis added]

Amicus, therefore, urges this Court to "include in the balance" not just children but also the many adults[79] who do want to be assaulted in the privacy of their homes by indecent programming on cable TV access channels.

IV
THE 'INDECENCY' STANDARD IS NEITHER VAGUE NOR OVERBROAD

Petitioners AAP also argue that the definition of "indecent" is vague.[80] In *Pacifica*, however, this Court, rejected a very similar challenge:

> [Pacifica] argues that the Commission's construction of the statutory language broadly encompasses so much constitutionally protected speech that reversal is required...At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excretory and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern...The danger dismissed so summarily in *Red Lion*...was that broadcasters would respond to the vagueness of the regulations by refusing to present programs dealing with important social and political

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[78] Id. at 127-128.

[79] *Cf.*, opinion polls cited in Peters, 'Information Superhighway or Technological Sewer: What Will It Be?, 47 *Fed. Com. L.J.*, Vol. 2, 333, at 334, footnotes 2-7 (December 1994).

[80] Pet. AAP Br. at 43-47.

> controversies. Invalidating any rule on the basis of its hypothetical application to situations not before the Court is "strong medicine" to be applied "sparingly and only as a last resort."[81]

In *Miller v. California,*[82] this Court also pointed to the "patently offensive sexual conduct" prong of its obscenity test (which is very similar to the FCC's "indecency" definition) as providing "fair notice" to those who traffic in sex materials.[83] Even before *Miller*, Justice Harlan equated "indecency" with "patent offensiveness:"

> These...cannot be deemed so offensive as to affront current community standards of decency -- a quality that we shall hereafter refer to as "patent offensiveness" or "indecency."[84]

Petitioners AAP argue, however, that while "patently offensive" is included in the obscenity definition, this Court has "limited the risk of arbitrary enforcement by adding other safeguards."[85] This, however, only restates the obvious--i.e., that "obscenity" defines a narrow category of speech which is outside First Amendment

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[81] *Id.* at 742-743.

[82] 413 U.S. 15 (1973).

[83] *Id.* at 27-28.

[84] *Manual Enterprises, Inc. v. Day*, 370 U.S. at 482.

[85] Pet. AAP Br. at 44.

protection, irrespective of context or medium,[86] while "indecency" defines a broader category. It has little to do with whether the second prong of *Miller* is vague.

Amicus notes further that what is "patently offensive" is determined by applying community standards.[87] Under the nuisance rationale, "time of day"[88] and "serious value,"[89] are also variables to be considered in determining *whether* programming is "indecent." The programs Petitioners AAP desire to protect, therefore, might not be "indecent" at all or if shown in the late evening or after midnight.[90]

There is also an extensive history of court decisions and FCC rulings to guide program providers in determining what is "patently offensive" or "indecent," and Amicus would contend that the real problem is not an inability to determine what is "indecent," but rather a failure to

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[86] See, e.g., *Kaplan v. California*, 413 U.S. 115, at 118-119 (1973).

[87] At page 9 of their brief, Petitioners AAP say that a program which provides valuable information may also be "controversial or offensive to some viewers." [Emphasis supplied] Programming is not "indecent," however, simply because it is "offensive to some viewers."

[88] *FCC v. Pacifica Foundation*, 438 U.S. 726, at 750.

[89] Cf., *Pacifica*, 438 U.S. 726, at 732, n.6; *Action for Children's TV v. FCC*, 852 F.2d 1332, at 1339-1340 (D.C. Cir. 1988).

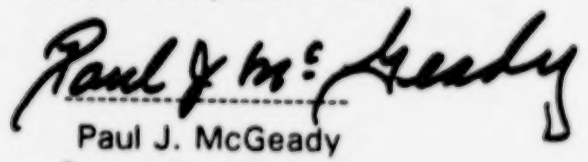
[90] *Amicus also contends, however, that some descriptions or depictions of sexual or excretory activities or organs on cable TV access channels are so offensive as to be "indecent" at ANY TIME OF DAY OR NIGHT and must be on a restricted access channel.*

recognize that there are "rights and interests, 'other than those of the advocates involved,'"[91] -- which include the "right of the Nation...to maintain a decent society."[92]

CONCLUSION

For all of the above the decision of the District of Columbia Circuit should be affirmed.

Respectfully submitted



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[91] *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, at 58 (1973) [quoting from *Breard v. Alexandria*, 341 U.S. 622, 642 (1951)].

[92] 413 U.S. at 59-60 [quoting from *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Mr. Chief Justice Warren, dissenting)]

(7) (8)

No. 95-124; 95-227

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IN THE

Supreme Court of the United States

October Term, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF TIME WARNER CABLE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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Consent of the Parties

All petitioners and respondents in both *Denver Area Educational Telecommunications Consortium, Inc. and American Civil Liberties Union v. F.C.C., et al.*, No. 95-124, and *Alliance for Community Media, et al. v. F.C.C., et al.*, No. 95-227, have consented to the filing of this brief. Their letters of consent are being filed herewith.

Interest of *Amicus Curiae*

Amicus Time Warner Cable ("TWC") is the second largest cable system operator in the United States, with more than ten million customers nationwide. TWC submits this brief to provide the Court with the unique and integral perspective of a cable operator, itself a First Amendment speaker and the key player in the challenged statute.

This Court should uphold the constitutionality of § 10(a) of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), which restores to cable operators some of their First Amendment rights of editorial discretion that Congress had previously (unconstitutionally, we believe) taken away from them under the leased access provisions of the Cable Communications Policy Act of 1984 ("1984 Cable Act"), 47 U.S.C. § 532.

Section 612 of the 1984 Cable Act, among other things, compelled most cable operators to set aside 10-15% of their activated channels for commercial use by persons unaffiliated with the operator ("leased access" channels). 47 U.S.C. § 532(b). Most importantly, § 612(c)(2) prohibited operators from exercising virtually any editorial control over programming on leased access channels. *Id.* § 532(c)(2). These leased access requirements clearly are in derogation of the operator's First Amendment rights and TWC has challenged them as unconstitutional. *See Daniels Cablevision, Inc. v. United States*, 835 F. Supp. 1 (D.D.C. 1993), *appeal pending*.

Through § 10(a) of the 1992 Cable Act (amending 47 U.S.C. § 532(h)), however, Congress restored a portion of the editorial discretion that it had taken away from cable operators. Congress recognized that by stripping cable operators of

virtually all editorial discretion over leased access channels, it had created the problem of forcing cable operators to make sexually explicit programming widely available including to unsuspecting subscribers and minors. Congress therefore returned to cable operators sufficient editorial discretion to permit them to choose not to telecast indecent programming on such channels.[1]

With its editorial discretion restored to it by Section 10(a), in July 1995, shortly after the *en banc* decision below, Time Warner New York City Cable Group, one of TWC's largest divisions, announced a Leased Access Policy ("Policy") for its systems providing that "indecent" programming on leased access channels be carried on a designated channel and only during late-night and overnight hours, and be scrambled during those hours. The signal would be unscrambled within 30 days upon receipt of a subscriber's confidential written request.

TWC made an editorial decision to implement this Policy on its New York City systems to respond to the strong desires of a large segment of its subscribers. For many years, one of Time Warner's southern Manhattan cable system's channels—35—has been home to a substantial amount of sexually explicit programming.[2] Channel 35 has been available on the basic tier of service in unscrambled form on that system. Notwithstanding the availability of parental control mechanisms in the converter boxes used by subscribers which permits locking out of channels, over time large numbers of subscribers complained that they or their children had been exposed involuntarily to indecent programming on that

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[1] 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992) ("This amendment simply gives the cable operator the right to reject [indecent programming]"). Introduced by Senator Helms and supported by Senator Thurmond, which petitioners intimate taints the section, the Amendment was approved unanimously by the Senate (*id.* at 649) and unopposed by the House in conference (H.R. Conf. Rep. No. 862, 102nd Cong., 2d. Sess. 80 (1992)).

[2] For instance, such programming has included graphic depictions of intercourse, masturbation, anal and oral sex, and advertising of phone sex lines and escort services.

channel. However, TWC, believing that other subscribers desired access to such programming, chose not to refuse to carry such programming altogether, as it could after § 10(a)'s effective date. Rather, the Policy fairly balanced the competing interests of the leased access programmers, the subscribers who did not want to receive the indecent programming on an unscrambled basis and those subscribers who desired to receive such programming.[3]

On September 20, 1995, the United States District Court for the Southern District of New York (Sand, J.) issued a preliminary injunction prohibiting the implementation of the Policy, holding that the plaintiff programmers were likely to succeed on the merits of their constitutional challenge to § 10(a) of the 1992 Cable Act, based substantially on the reasons set forth in Judge Wald's dissent. *Goldstein v. Time Warner Cable of New York City,* 1995 WL 562182 (S.D.N.Y. 1995). TWC agreed, in the interests of judicial economy, not to pursue its appeal pending resolution of this case.

In spite of Congress' return of cable operators' First Amendment right of editorial discretion, therefore, TWC's New York City cable system remains unable to exercise that right, and may continue to be unable to do so until this Court upholds the constitutionality of § 10(a).

Summary of Argument

Section 10(a), 47 U.S.C. § 532(h), merely returns to cable operators a certain degree of editorial discretion unconstitutionally taken from them in 1984 with respect to leased access channels (*see id.* § 532(c)(2)). Petitioners' various arguments as to § 10's alleged unconstitutionality all suffer from the fundamental error of ignoring Congress' original act of taking away cable operators' First Amendment

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[3] Channel 35 also carries substantial amounts of non-indecent programming. Under the Policy, to receive the indecent programming on Channel 35 a subscriber simply returns a card provided by TWC that states that the ordering person is the subscriber and is over 18 years old. The card is sealed, subject to confidentiality under 47 U.S.C. § 551, and indicates only that the subscriber wants to receive all Channel 35's programming.

rights. This Court simply cannot begin its inquiry midstream by looking only at the 1992 Amendments. Similarly, the Court must reject petitioners' invitation to analyze their claim without regard to the constitutionally based rights of cable operators which are integral to any analysis of § 10(a).

Section 10(a) authorizes private, not state, action and does not affect speech in a public forum, and therefore is not subject to First Amendment scrutiny. Contrary to petitioners' assertion, the state action analysis cannot be bypassed, nor state action presumed. The dissent below, determining that the blocking requirements of § 10(b) create state action, misinterpreted § 10 and misapplied this Court's cases regarding the level of encouragement of action by private entities permitted to Congress without creating state action. Here, notwithstanding the blocking requirements in § 10(b), § 10(a) permits voluntary action by the cable operator and involves no compulsion. As such, the procedural safeguards necessary for prior restraints are unnecessary with respect to § 10(a). Further, if § 10(b) does create state action, the Court is required to sever it from the rest of the statute to preserve the statute's constitutionality.

Even if state action is present, where the alleged "censor" is an electronic publisher, fully protected by the First Amendment, that publisher's constitutional freedoms must be considered in conjunction with any alleged infringements resulting from the exercise of its constitutional rights. Once the operators' First Amendment rights are put into the balance, there is no basis to hold that § 10(a) violates the First Amendment.

Finally, if the amendment embodied in § 10(a) is struck down, then the leased access statute clearly would no longer square with the congressional objective since it would remove more editorial discretion from cable operators than Congress intended. That ill-fit of means and end requires that what would be left of 47 U.S.C. § 532 be declared violative of the First Amendment.

Argument

I. PETITIONERS' SECTION 10(a) ARGUMENTS FAIL BECAUSE THEY IGNORE THE CONSTITUTIONAL RIGHTS OF CABLE OPERATORS, WHICH ARE INTEGRAL TO—AND THE STARTING POINT FOR—THE ANALYSIS.

Petitioners' arguments to this Court focus on the alleged unfairness and discrimination against programmers who may include indecent material in their programming that supposedly would result from § 10's implementation. While TWC agrees that this Court must consider the effects of § 10, as did the majority below, we submit that any analysis of § 10(a)'s constitutionality must start with the fact that cable operators are engaged in the constitutionally protected editorial activities of producing programming and selecting what programming they distribute to their subscribers.[4] The 1984 Cable Act, in derogation of those First Amendment rights, required that cable operators convert a portion of their capacity to leased access channels and removed the operators' editorial control over such channels.[5]

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[4] This Court, as early as 1979, recognized that cable operators, in making programming selections to create a lineup of services, are engaged in activity protected by the First Amendment. *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979) ("[c]able operators now share with broadcasters a significant amount of editorial discretion regarding what their programming will include"); *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("[c]able television partakes of some of the aspects of speech and the communication of ideas as do the traditional enterprises of newspaper and book publishers, public speakers, and pamphleteers"); *Turner Broadcasting Sys., Inc. v. FCC*, 114 S. Ct. 2445, 2456 (1994) ("[c]able programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment").

[5] The Denver Area Educational Telecommunications Consortium and ACLU petitioners (collectively, "ACLU petitioners") in a bizarre twist argue that since leased access channels are creatures of federal creation, whatever editorial control over those channels the operator has is statutorily bestowed by the government. *See* ACLU Br. 21. This again ignores that editorial

Petitioners' arguments misleadingly focus on the more narrow issue of the effect of the 1992 Amendments to the Cable Act on leased access programmers, and ignore the larger issue that those programmers gained access to such channel capacity for the first time in 1984 by virtue of a statute that restricts the First Amendment rights of cable operators. Even if Congress could constitutionally mandate such access, the First Amendment rights of cable operators are integral to the analysis of § 10 and cannot be ignored, as petitioners would have this Court do. While indecent speech may enjoy constitutional protection, petitioners' right of access to private operators' cable systems for such speech is only statutorily based; it does not spring, as does the cable operator's right to exercise editorial discretion, from the Constitution.[6]

This Court recognized in the context of FCC-imposed access requirements that "even when not occasioning the displacement of alternative programming, compelling cable operators indiscriminately to accept access programming will interfere with their determinations regarding the total service offering to be extended to subscribers". *Midwest Video*, 440 U.S. at 707 n.17. Even more suspect is petitioners' request that this Court force cable operators to carry a specific type of programming, and to do so without considering the effect on the operators' First Amendment rights.

Similarly skewed is petitioners' contention that § 10 necessarily "disadvantages" those programmers desiring to offer indecent programming. *See* Alliance Br. 22. In fact, as to indecent programming, it merely returns such programmers

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control (and ownership) over each channel starts, under the Constitution, with the cable operator. The government then may be able to *restrict* that editorial control, but it *bestows* nothing on the operator. Indeed, the result that petitioners seek would turn the First Amendment on its head by leaving it to Congress to determine when and if publishers (*i.e.*, cable operators) can have any First Amendment rights whatsoever.

[6] The Alliance For Community Media ("Alliance") petitioners acknowledge that the right they are asserting in this case is a "statutory right" to be carried on an unrestricted basis. Alliance Br. 3.

to the same position as most non-leased access programmers with regard to cable operators' ability to exercise their constitutionally protected free speech rights. And yet, these leased access programmers still are in a favored position vis-a-vis other programmers since the operators' editorial control remains severely curtailed as to most other programming these same producers offer.

II. SECTION 10(a) DOES NOT CONSTITUTE STATE ACTION AND THEREFORE DOES NOT RAISE ANY CONSTITUTIONAL ISSUES.

In analyzing whether § 10(a) constitutes state action, this Court must consider that a cable operator such as TWC, a private actor, desires to exercise its First Amendment rights by banning or restricting certain indecent programming in order to editorially craft its program offerings. A cable operator's decision to telecast *or not* telecast certain speech is itself an act which is protected by the First Amendment.[7]

Even if it were assumed that the government wishes to restrict or ban indecent programming on leased access channels, a holding that § 10(a) constitutes state action truly would be novel. Nothing in the Court's prior decisions supports a finding of state action where a private speaker as an editorial matter affirmatively desires to engage in the conduct petitioners claim the government is advocating and which itself is constitutionally protected. Under such circumstances, any state "encouragement" must be weighed against the operators' First Amendment right to decide for themselves what they will or will not telecast. *See Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 120 (1973) (plurality opinion joined by Rehnquist, J., recognizing that fundamental to the state action analysis is whether the actor itself is a First Amendment speaker).

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[7] *See Riley v. National Fed'n of the Blind, Inc.*, 487 U.S. 781, 796-97 (1988) ("First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what not to say").

A. The State Action Inquiry Cannot Be Ignored Merely Because Regulation Is Involved.

Petitioners contend that the state action issue poses no obstacle for this Court's review of § 10's constitutionality because the government is choosing which speech will be subject to the cable operators' exercise of their free speech rights. On one hand, the ACLU petitioners argue that the state action analysis simply can be skipped. ACLU Br. 19. The Alliance petitioners, on the other hand, propose that a finding of state action in this case is *automatic* by the mere "creation of the content-based law itself". Alliance Br. 22.[8] This is just wrong. Not even the dissent below suggested that the state action analysis could be either disposed of or its outcome assumed.

Petitioners claim that, as the courts must decide the constitutionality of every "legislative abridgment of [First Amendment] rights", the Court of Appeals in this case "disobeyed that mandate" by determining that it need not undergo a First Amendment analysis. ACLU Br. 19, quoting *Schneider v. New Jersey*, 308 U.S. 147, 161 (1939). Even if petitioners are correct, there has been no such abridgement here.[9] The programmers' original right of access was based on a statutory grant by Congress—there was, and still is, no First

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[8] *Amicus* American Booksellers for Free Expression agree that the fact that a plaintiff is "challenging the statute and regulations themselves . . . does not end the inquiry" regarding whether the private party should be considered a state actor. Am. Booksellers Br. 9. Rather, the "private party's actions" under the statute challenged must be analyzed. *Id.*

[9] The petitioners grievously misapply this Court's language in *Schneider*. While it is true that the Court held in that case that where a First Amendment violation is alleged "the courts should be astute to examine *the effect* of the challenged legislation" (*id.* (emphasis added)), the Court did not hold, as petitioners argue, that such an allegation requires a court to "decide its *constitutionality*" in every case. *See* ACLU Br. 19 (emphasis added). Rather, an examination of the effect of the challenged legislation necessarily must include the question of whether the Constitution is *implicated* by that legislation. Whether there is state action is integral to that analysis in the First Amendment context.

Amendment entitlement to such access. Congress' removal of that mandated access does not curtail First Amendment rights—it recognizes them (albeit in a limited fashion) by returning editorial discretion to the cable operator. The analysis therefore must focus on whether the actor who is allegedly "silencing" certain speech is acting for the state when it decides, if it does, to deny access to indecent programming.[10]

Petitioners' argument that the state action question arises only in cases involving an "individual citizen" that "feels that his [or her] freedoms or rights have been violated by the actions of another"[11] also misses the mark. Whom the plaintiff chooses to sue, whether the individual actor or the government through a facial challenge to the statute, simply does not determine whether the constitutional analysis is undertaken. For instance, petitioners cite *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991). ACLU Br. 19 n.24. In that case, this Court, in deciding whether the alleged racially discriminatory use of preemptory challenges in civil cases amounted to state action, first analyzed whether the act in question was created by the government. This Court found that the alleged discrimination *would not have been possible* without the government's creation of preemptory challenges. *Id.* at 620-21 ("there is no constitutional obligation to allow [preemptory challenges]"). Here, the cable operators' underlying right not to carry programming if it so desires derives directly from the Constitution, not from § 10(a)—they need legislative

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[10] The argument that this Court should focus on only the potentially harmful effects of decisions made pursuant to § 10 and ignore who the decision-makers are (ACLU Br. at 16-17) is simply a different formulation of the argument that this Court dispense with the state action analysis altogether. While petitioners cite cases that allegedly support their position that the effect of the statute marks the proper starting point for constitutional analysis (*see id.* at 16 and n.21), in all those cases (and unlike here) the state action was clear—legislation either prohibited or compelled specific behavior, resulting in the infringement of free speech.

[11] ACLU Br. 19, n.24; Alliance Br. 22, quoting Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure* § 16.1, at 524 (2d ed. 1992).

authorization only to countermand the legislative blocking of the exercise of that constitutional right in the first place.

Petitioners and amici attempt to distinguish several cases cited by the majority below finding no state action on the ground that the challenges in those cases were not direct challenges to any statutes or administrative regulations. *See Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974); *Blum v. Yaretsky*, 457 U.S. 991 (1982). In each of those cases, however, because there was no authorizing statute, the state action inquiry necessarily revolved around the private actor's conduct, and no statute could have been facially challenged. *See, e.g., Rendell-Baker*, 457 U.S. at 841 ("the decisions to discharge the petitioners were not compelled or even influenced by any state regulation"). Nothing in this Court's precedents suggest that the state action inquiry would not need to be conducted in those cases if a legislative enactment authorizing the private action at issue was instead challenged directly. Indeed, the Court's emphasis on the importance of the analysis of the actions of the private individuals suggests that such an inquiry is always central, regardless of whether such action is challenged directly or as the logical consequence of an authorizing statute. [12]

Petitioners and amici cite a snippet from Laurence Tribe's constitutional law treatise which allegedly supports their argument that a direct challenge to a statute obviates the need for a "formal inquiry" into the state action issue. *See* Alliance Br. 21; Am. Booksellers Br. 6-7. The full sentence from Tribe's treatise, however, makes clear that state action is "obvious" only where the challenged statute is facially discriminatory, "such as a law mandating racial segregation of

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[12] Similar to *Leesville Concrete*, the state action inquiry in *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922 (1982), did not turn on whether the plaintiff facially challenged the statute authorizing prejudgment attachment, or sued the individual attaching the subject property. In fact, the main inquiry in that case involved whether Section 1983's requirement of "under color of" state law differed from the state action requirement. *Id.* at 926-35.

public schools". Laurence H. Tribe, *American Constitutional Law* § 18-1, at 1688 (2d. ed. 1988). This is not such a case. After all, as discussed above, § 10(a) merely authorizes cable operators to engage in their own constitutionally protected activity that Congress had previously denied them. As Tribe goes on to discuss, one of the primary purposes of the state action doctrine is to carve out an arena where the Constitution may not infringe on individual freedoms:

> "[B]y exempting private action from the reach of the Constitution's prohibitions, [the state action requirement] stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices, such as choices of the persons with whom they will associate. Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands." *Id.* § 18-2, at 1691.

The importance of keeping an individual freedom exempt from constitutional scrutiny is heightened where, as here, that freedom itself *specifically* is constitutionally protected. The finding of state action, therefore, cannot simply be presumed as petitioners suggest.[13]

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[13] The ACLU petitioners' reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Larkin v. Grendel's Den Inc.*, 459 U.S. 116 (1982), as cases in which statutes were "subjected . . . to scrutiny even where no harm would have occurred unless a third party did something that it was authorized (but not compelled) to do" (ACLU Br. at 17), is similarly without merit. As the Court below recognized, state action existed in those cases because the government gave the private parties powers that traditionally had been exclusively that of the government. App. 12a-13a (citations to "App.__a" herein refer to the appendix to the Petition for a Writ of Certiorari in No. 95-124). In *Loretto*, this Court analyzed whether a New York law requiring a landlord to permit a cable company to install its facilities on rental property constituted a "taking" under the Fifth Amendment and, recognizing the landlord's constitutionally protected property rights, this Court determined that the statute was a taking. 458 U.S. at 423, 441. The ACLU petitioners attempt to analogize the conduct of the cable operator in *Loretto* to that of the cable operator pursuant to § 10, as the cable operator in *Loretto* was not

Petitioners' citation to Sunstein's *The Partial Constitution* (1993) similarly does not support their contention that the state action analysis is not necessary here. To the contrary, Sunstein consistently points out the necessity of the state action inquiry, emphasizing that "the First Amendment is aimed only at governmental action, and that private conduct raises no constitutional question". *Id.* at 204. Moreover, according to Sunstein, the expression of ideas by private actors in the marketplace does not raise any constitutional concerns. Rather, it is the "'regulation' of 'the market' that is problematic". *Id.* Under this formulation, Congress' original "regulation" of leased access in the 1984 Cable Act is constitutionally suspect. Its "deregulation" of speech, albeit only in part, through § 10(a) therefore necessarily lessens (but far from eliminates) the constitutional problems inherent in the initial regulation and cannot itself be unconstitutional.[14]

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compelled, but only authorized, to seek access to the landlord's property. This analogy fails because the cable operator in *Loretto* was asserting a statutory, not a constitutional right of access. If anything, the cable operator vested with the authority pursuant to § 10 is more like the landlord in *Loretto*—an entity with recognized constitutional rights which must be protected. In that case, this Court determined that the rights could be protected by just compensation; here, the Court should determine that the rights must be protected by upholding the statute.

Larkin clearly does not support ACLU petitioners' argument that the state action analysis can be disregarded. There, this Court found objectionable that the state had delegated to a private party the decision-making authority that properly belongs in the hands of the state—the power to issue liquor licenses. *See* 459 U.S. at 127. Because that power was placed in the hands of religious organizations, this Court concluded that the statute violated the Establishment Clause. *Id.*

[14] Another way of looking at the instant case is that Congress granted programmers on leased access channels greater rights to access than that to which they are entitled under the Constitution. That Congress now chooses to repeal its grant of that excess protection cannot be considered unconstitutional merely because the repeal is partial. As this Court recognized in *Crawford v. Board of Educ.*, 458 U.S. 527 (1982), in its consideration of a state constitutional amendment limiting the power of the state courts to enforce the state-created right to desegregated schools:

> "In short, having gone beyond the requirements of the Federal Constitution, the State was free to return in part to the standard prevailing generally throughout the United States. It could have conformed its law to the Federal Constitution in every respect. That it chose to pull back only in part . . . most assuredly does not render the Proposition unconstitutional on its face." *Id.* at 542.

That said, petitioners' claim that *any* partial restoration to cable operators of their editorial discretion, *e.g.*, vis-a-vis "the speech of African-Americans or socialists or speech opposing reduction of welfare grants" (ACLU Br. 22; *see also* Alliance Br. 23) would be facially violative of the First Amendment is unsupported and insupportable. Indeed, any restoration of cable operators' editorial discretion must be analyzed, as discussed herein, within the context of the operators' First Amendment rights (as opposed to programmers' statutorily granted access rights), and therefore is presumptively constitutional.

Petitioners' attempt to analogize the instant case to one in which Congress carves out an exception to Title VII to allow private employers to discriminate against persons of a particular race is similarly misguided. *See* Alliance Br. 23. Petitioners' contention that such a "statute would arguably 'restore' to employers the pre-existing right to base employment decisions on discriminatory grounds" (*id.*) conveniently overlooks the essential distinction that employers have no constitutional right to so discriminate. *See Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (rejecting claim that application of Title VII would infringe constitutional rights of freedom of association because "'invidious private discrimination . . . has never been accorded affirmative constitutional protections'", (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973))).[15] Here, on the other hand, cable operators do have a constitutionally protected right to refrain from engaging in certain types of speech, including indecent speech. *See supra* n.7.

Finally, petitioners contend that § 10(a) is not a restoration of cable operators' First Amendment rights of editorial

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[15] Petitioners' reliance on *Reitman v. Mulkey*, 387 U.S. 369 (1967) and *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.*, 483 U.S. 522 (1987) (*see* ACLU Br. 20), fails for the same reason. In both cases there was no federal *constitutional* right to engage in the private conduct authorized under the statute.

discretion because when the 1984 Cable Act was passed, many cable operators had already entered into local franchise agreements prohibiting cable operators from exercising such editorial discretion. *See* Alliance Br. 5, 23; ACLU Br. 3. While that argument is flawed even as to public access channels, it cannot be made as to *commercial leased access* channels, which did not exist prior to the 1984 Cable Act.[16] Any channels over which a cable operator relinquished its editorial control through the franchise process were *public* access channels. The 10-15% of a cable system's channel capacity that today must be dedicated to commercial leased access use were under the complete editorial control of cable operators prior to 1984.

B. No Provision In Section 10 Amounts To "Significant Encouragement" So As To Create State Action In Section 10(a).

A finding of state action is justified when the private entity performs a public function, or when the actions of the private entity evidence a sufficiently close nexus between the government and that entity to attribute the actions of the entity to the government itself. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351-52 (1974). Where, as here, neither justification is present, no finding of state action is warranted.

Petitioners, as well as Judge Wald in dissent below, argue for a finding of state action based on the flawed notion that, through § 10, the government coerces cable operators into taking "adverse action" against indecent programming. *See* App. 46a-49a; Alliance Br. 28-30; ACLU Br. 24. Section 10 simply does not *command* or otherwise coerce that result, but leaves the cable operator to choose from at least

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[16] Petitioners' statement that "access channels" have been dedicated for 25 years (Alliance Br. 4; ACLU Br. 2), is but one example of petitioners' and amici's blending of "public" and "leased" channels into "access" channels when convenient to their argument. While TWC primarily comments herein on the constitutionality of leased access requirements, we urge this Court to analyze public and leased access channels separately to the extent that their characteristics do in fact differ.

three options—it may prohibit indecent programming under § 10(a), it may choose to institute on its system the FCC regulations regarding indecent programming as issued under § 10(b), or it may provide such indecent programming on non-access channels, where it has the discretion to telecast such programming as it sees fit (the "middle ground" petitioners claim does not exist, *see* Alliance Br. 29).[17] The very existence of these choices obliterates petitioners' argument that *Congress* has chosen how to treat indecent programming, and makes clear the error of Judge Wald's proposition that "the §§ 10(a) and (b) option is no different in its effect" from a formulation requiring a cable operator either to ban indecent programming or to block it pursuant to the government's directives (App. 48a).

While petitioners claim operators are hostile to indecent

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[17] Indeed, TWC in its Policy, which was not pursuant to § 10(b), exercised a fourth option. The Policy did not implement the total ban permitted by § 10(a), but rather put certain restrictions on indecent programming (by scrambling and late-night scheduling). *See In re Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992*, 8 F.C.C. Rcd. 998 (1993) ("First Report and Order", App. 128a) ¶ 31, App. 144a ("[s]ection 10(a) would also appear to permit cable operators to adopt any measures appropriate for implementation including, but not limited to, the requirements we adopt under section 10(b)"). After all, the greater power to ban indecent programming under § 10(a) includes the lesser power to impose restrictions on such programming. *See Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 345-46 (1986); *United States v. O'Neil*, 11 F.3d 292, 296-97 (1st Cir. 1993) (recognizing that "[t]he principle that the grant of a greater power includes the grant of a lesser power is a bit of common sense that has been recognized in virtually every legal code from time immemorial" and applying principle in criminal law context, citing *Posadas*). Although the second sentence of § 532(h) does use the word "prohibiting" in describing a policy on indecent programming, when read in conjunction with the "subject to conditions" language of the first sentence, the statute is at least ambiguous as to whether cable operators are free under § 10(a) voluntarily to enact policies which do less than prohibit indecent programming. As the FCC recognized, the overall section and congressional intent appear to have the objective of permitting a cable operator voluntarily to condition the offering of indecent programming if it does not ban such programming.

programming on leased access and will disadvantage such programming "while retaining this profitable income source on their own channels" (Alliance Br. 43), they really are complaining that other programmers have created more attractive programming that cable operators are anxious to program without coercion.

Similarly, even if the presence of § 10(b) provides some incentive for cable operators to establish their own policy to prohibit indecent programming, that is not enough to find state action by "significant encouragement". Such an argument was rejected in *Blum v. Yaretsky*, where the Court held that decisions to transfer patients on Medicaid from state-subsidized nursing homes to lower level facilities were private actions of the medical staff rather than state action, notwithstanding that government regulations made such transfer possible and, in fact, encouraged the nursing homes to transfer patients to less expensive facilities when appropriate. 457 U.S. 991, 1007-08, 1008 n.18 (1982).[18] So too with § 10. Nothing in §§ 10(a) or (b) dictates the outcome, and § 10(b) does not "dominate" the operators' decision-making process. *See* App. 22a-23a.[19]

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[18] *See also Flagg Bros. v. Brooks*, 436 U.S. 149, 164-66 (1978) (holding that enactment of statute enabling private sale of goods by warehouseman was not "authorization" or "encouragement" sufficient to constitute state action); *Jackson*, 419 U.S. at 357 ("[r]espondent's exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so 'state action'"); *id.* at 350 (state regulations even if "extensive and detailed" did not make utility's action state action).

[19] Similarly, in *Dial Information Servs. Corp. v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992), the Second Circuit upheld a statute requiring telephone companies that provide billing services for dial-a-porn providers not to transmit dial-a-porn unless the customer specifically requested access (or "presubscribed"). That court found no state action, emphasizing that the statute "does not require the telephone company to implement the presubscription method of billing, unless the company voluntarily has chosen to provide billing services for providers". *Id.* at 1543. Nor did the Court find that the statute compelled the telephone company to refuse to provide billing services to dial-a-porn providers.

The criteria to be applied is not governmentally dictated, but rather left to the operators' considerations of the desires of its subscribers and its views of optimum programming mix. The fact that Congress defined the area of programming for which it was returning editorial control does not create state action since without some delineation of the sphere in which the cable operator could exercise its discretion, the return of editorial control could not effectively be accomplished. That is not the kind of "involvement" that can create state action.[20]

Petitioners also attempt to compare the facts in the instant case with those in *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), in order to support their overly aggressive assertion that anything "more than just a 'passive position' toward the challenged" private action constitutes state action. Alliance Br. 27-28; *see also id.* at 32 (*Skinner* has "strikingly similar facts"); ACLU Br. 24. This comparison falls quite short. *Skinner* involved the issue of whether the Fourth Amendment is applicable to actions of private parties, as a search and seizure can be unconstitutional only if conducted by the state or a private party acting as "an instrument or agent of the Government". 489 U.S. at 614. This Court in *Skinner* found "clear indices of the Government's encouragement, endorsement, and participation" in the testing of railway workers for drugs and alcohol. *Id.* at 615-16. These "specific features" included the Federal Railroad

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[20] Thus, the argument of *amicus* American Booksellers that state action exists here because the "standard" for decision-making is "established by the state" is incorrect. *See* Am. Booksellers Br. 9-10 n.16. The state is merely defining the realm over which private actors, cable operators, have the ability to make private decisions. The finding in *Blum* that there was no state action because the decisions to transfer or discharge patients turn on "judgments made by private parties" (457 U.S. at 1008), therefore, is directly analogous to the instant case. *See Carlin Communications, Inc. v. Southern Bell Tel. & Tel. Co.*, 802 F.2d 1352, 1357-61 (11th Cir. 1986) (regulator's study and explicit approval of public utility's policy of banning indecent messages did not make that policy state action, where decision as to which messages were indecent was made by utility).

Administration's actual participation in the testing of railroad employees with the right to receive test samples and results. *Id.* at 615. Here, not only is there absolutely no similarity on the facts of the two cases, but § 10(a)'s return to cable operators of the ability to exercise editorial control over indecent programming does not even approach the high degree of government participation involved in *Skinner*.[21]

Petitioners also argue that, by removing cable operators' immunity from liability for telecasting obscene programming on leased access channels, § 10(d) forces operators to ban indecent speech out of an excess of caution. *See* Alliance Br. 29-30; ACLU Br. 5. While TWC contends that § 10(d) places unconstitutional burdens on cable operators where they are forced to deal with program providers on leased access, petitioners nonetheless overstate the effect of § 10(d) vis-a-vis state action. Here, the FCC has determined that operators may pre-screen programs to limit their liability under § 10(a). First Report and Order ¶ 43 n.39, App. 151a. The FCC also notes that: (i) consistent with *Smith v. California*, 361 U.S. 147 (1959), operators who do not prescreen, and thus lack actual knowledge of the contents of a program, should be immune from prosecution for violation of obscenity laws (First Report and Order ¶ 43 n.39, App. 151a-152a); and (ii) cable operators may also avoid liability under § 10(b) by relying on the certification of the programmers (*id.* ¶ 43, App. 151a-152a).[22]

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[21] Petitioner's claim that state action exists because the FCC will adjudicate disputes over whether certain programming is indecent (Alliance Br. 31-32) simply is not applicable to § 10(a), as such a dispute resolution mechanism is provided only for disputes arising under § 10(b). First Report and Order ¶ 75, App. 167a-168a.

[22] Petitioners ignore this Court's holding in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). In that case, the Court noted that any obscenity statute will "have some inhibitory effect on the dissemination of material not obscene". *Id.* at 60. However, it squarely held that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render [it] unconstitutional". *Id.* Petitioners also contradict themselves by arguing both that cable operators choose to carry indecent programming on non-access channels (*see* Alliance Br. 43), and that cable

At bottom, nothing in § 10 significantly encourages the cable operator to ban indecent programming. Moreover, the fact that Senator Helms and others in Congress may have counted on cable operators' inclination to restrict or ban indecent programming on leased access if given back their editorial control is not a basis for finding state action. After all, the converging of a private actor's objective with that of Congress, if not achieved by congressional coercion or direct government participation (which has not happened here), does not trigger state action, especially where the private actor is exercising rights protected by the First Amendment.

C. Petitioners' Reliance On Federal Preemption Of State Law To Create State Action Is Misplaced.

Petitioners rely almost exclusively on *Railway Employes' Dep't v. Hanson*, 351 U.S. 225 (1956), for the proposition that state action inheres where a federal statute preempts state law. Alliance Br. 24-27; ACLU Br. 23-24. *Hanson* was a labor case that simply does not support a theory that preemption *per se* equals state action.[23]

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operators uniformly will "take the safe route and simply ban all materials" that cannot be certified as "decent" (*see* Alliance Br. 30).

[23] In *Hanson*, non-union employees brought an action against a railroad company and labor organizations to enjoin the application and enforcement of a union shop agreement. The ACLU petitioners' contention that this Court "subsequently and repeatedly [has] reaffirmed *Hanson's* rationale" is simply wrong. *See* ACLU Br. 23 n.30, citing *Communications Workers of Am. v. Beck*, 487 U.S. 735, 761 (1988), and *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 218 n.12 (1977). Neither *Beck* nor *Abood* commented on the validity of *Hanson's* rationale with regard to the state action issue, but instead made passing reference to the Court's state action analysis in *Hanson* in *dicta*. *See Beck*, 487 U.S. at 761 (noting petitioner's reliance on *Hanson* and concluding that "[w]e need not decide whether the exercise of rights permitted, though not compelled, by [the statute at issue] involves state action"); *Abood*, 431 U.S. at 218 n.12 (the Court merely described the state action analysis in *dicta*, but neither commented on its validity nor deemed it necessary for its holding).

Neither is the *Skinner* decision supportive of petitioners' "preemption creates state action" theory. A close reading of *Skinner* evidences that the Court's determination of state action in that case was made, as it must be,

First, the theory that federal preemption of state law *alone* can create state action is itself unsound. After all,

> "[i]t is surely not the case that any time the federal government preempts state law, state action exists. As Professor Wellington explained . . . , if the preemption theory were adopted, '[it would mean] that all private action taken under the authority of federal legislation that occupies a field by that token alone becomes governmental action.'"[24]

Second, in *Hanson*, the "source of the power" to invade "private rights" was the federal statute. 351 U.S. at 232. Here, the true source of a cable operator's power to restrict indecent programming is its private, constitutionally recognized right of editorial discretion, not § 10(a). *Third*, neither *Hanson* nor *Skinner* has been applied outside the labor context to find state action, and there is no reason to do so in this case.

III. EVEN IF SECTION 10(a) CONSTITUTES STATE ACTION, IT IS CONSTITUTIONAL WHEN THE FIRST AMENDMENT RIGHTS OF CABLE OPERATORS ARE BALANCED AGAINST THE ASSERTED RIGHTS OF LEASED ACCESS PROGRAMMERS, AS THEY MUST BE.

Even if § 10(a) is found to constitute state action (or a

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in view of all the circumstances. *Skinner*, 489 U.S. at 614. The "circumstances" in that case were numerous, including regulations that superseded collective bargaining agreements and prohibited the railroad from divesting itself by contract of the authority to test employees. *Id.* at 615. In addition, the regulations *mandated* compliance by employees. *Id.* Clearly, then, federal preemption of state law in *Skinner* was merely *one* factor considered by the Court in its analysis of whether there was sufficient "Government[] encouragement, endorsement, and participation" to implicate constitutional safeguards. *Id.* at 615-16. There is no authority for a finding of state action here where federal preemption is the *only* factor.

[24] David H. Topol, *Union Shops, State Action, and the National Labor Relations Act*, 101 Yale L.J. 1135, 1149 (1992) (*quoting* Harry H. Wellington, *The Constitution, the Labor Union, and "Governmental Action"*, 70 Yale L.J. 345, 356-57 (1961)).

First Amendment analysis of that provision is otherwise required), and further assuming that mandatory leased access itself is not unconstitutional as a violation of cable operators' First Amendment rights, that would not justify the application of the "strict scrutiny" test. A different test should be applied where, as here, the "state actor" is a First Amendment speaker, such as a cable operator, which itself independently desires (and but for government interference once had the right) to take the action at issue. This would be consistent with the recognition, adopted in the Establishment Clause area, that "a test which may be reasonable in one context may be wholly inappropriate in another". *Katcoff v. Marsh*, 755 F.2d 223, 233 (2d Cir. 1985). Under such circumstances, the Court must balance the cable operator's First Amendment rights, the government's interests and whatever rights leased access programmers have once granted access onto cable systems. A finding of state action neither strips the cable operator of its First Amendment rights, nor removes those rights from the analysis of its actions upon leased access programming.[25]

This approach of balancing competing interests is no less valid here than when weighing pure governmental action against a First Amendment speaker's rights, an approach which lies at the very heart of First Amendment jurisprudence. *See, e.g., New York v. Ferber*, 458 U.S. 747, 764 (1982) (balancing competing interests of government restricting child pornography with First Amendment speaker's right of expression); *Carroll v. Blinken*, 957 F.2d 991, 999-1002 (2d Cir.) (court needed to balance the First Amendment rights of students not to underwrite speech of others with university's First Amendment interests in fostering a "marketplace of ideas" on its campus), *cert. denied*, 113 S. Ct. 300 (1992).[26]

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[25] To the extent that the Government is considered to have conceded (either in this Court or below) that § 10(a) is unconstitutional if there is state action, TWC strongly disagrees for the reasons set forth herein.

[26] This corresponds with the notion adopted in the First Amendment context that the Free Exercise Clause and the Establishment Clause, while potentially at odds, must be reconciled in practice. *See Katcoff*, 755 F.2d

Where there is an independent First Amendment basis for the operator's action, the challenged statute should be upheld even if not the least restrictive manner of accomplishing its objective. This certainly should be so where, as here, the statute allows the operator the flexibility to avoid unduly burdening the programmers' speech. *See* n.17, *supra*.

Section 10(a) permits TWC to exercise its First Amendment right (restrained by Congress in 1984) to package its programming in the best way it sees fit and to respond to its subscribers' concerns by limiting the exposure of certain subscribers—unsuspecting adults and minors—to indecent programming, while being responsive to subscribers who want access to such programming. Petitioners offer no evidence refuting that indecent programming on access channels is troublesome to large numbers of viewers.[27] Section 10(a) also furthers the government's interest in addressing the problem of indecent programming available in an unrestricted manner on leased access channels. Weighed against these interests are programmers' *statutory* rights to access granted by Congress, *not* the Constitution, in derogation of TWC's First Amendment rights.

Even if petitioners are found to be asserting First Amendment rights, it simply cannot be true that program providers and viewers desiring to have access to plaintiffs' programming via cable have greater rights than the cable

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at 234 n.4 ("'[t]hese two proscriptions are to be read together, and in light of the single end which they are designed to serve'" (quoting *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring))). "Just as it is a function of the judiciary to strike the balance between the competing claims of the free exercise clause and the establishment clause of the first amendment, so it is the court's responsibility to strike the balance between competing first amendment issues in the media-access cases". Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. Chi. L. Rev. 20, 48 (1975) (footnote omitted).

[27] For example, during the Senate floor debate on § 10, a letter was read into the record from a cable subscriber complaining that she and her daughter stumbled upon a "couple engaging in oral sex" on an access channel in New York. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992).

operators (and those of their subscribers) who want to reject indecent programming. *See* App. 13a (recognizing this case as "'a battle for supremacy between the asserted rights of private persons'"). Section 10(a) allows cable operators to adopt an approach such as TWC's Policy, which is clearly a reasonable means of balancing the competing interests of its First Amendment rights with the interests of programmers and both groups of subscribers. Indeed, by placing the decision on indecent programming back in the cable operators' hands, the government has removed itself from the process—in practical effect the least intrusive approach.

Permitting cable operators to refuse to telecast indecent programming altogether, or to telecast it only under restrictions the cable operator finds acceptable, does not restrict First Amendment rights; it recognizes them.[28] The balancing of interests here must be resolved in favor of § 10(a)'s constitutionality. And the cable operators' approach, if somehow unreasonable, might be redressed, as to leased access channels for example, by an action under § 612(d)—not by striking down a statute that itself lessens restrictions on the cable operators' First Amendment rights.

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[28] Cable operators have always had the unfettered ability to make decisions regarding programming carried on non-public, non-leased access channels. Section 10 gives back that same ability to operators with regard to indecent programming on leased access channels. Further, the record only indicates that to the extent there is arguably indecent programming on non-access channels, the signals on those channels are scrambled unless separately ordered (like Playboy and Showtime), thereby already providing some measure of protection against exposure of minors and unsuspecting subscribers to such programming. Adult pay-per-view channels also are scrambled and must be separately ordered—with parents having the option of a private code to gain access to such films. Section 10, therefore, does not disadvantage indecent leased access programming; it merely takes away the unfair advantage granted such programming by Congress under the 1984 Cable Act to the detriment of operators' First Amendment rights.

IV. SECTION 10(a) DOES NOT AUTHORIZE A PRIOR RESTRAINT.

Petitioners' argument that § 10(a) fails because it creates a censorship scheme amounting to a prior restraint without procedural safeguards also suffers from fatal defects.

First, as discussed above, § 10(a) merely authorizes *private* action. Cable operators who take action pursuant to § 10(a) are not state actors and, as a result, are not subject to procedural due process requirements. *Second*, and related, the action permitted by § 10(a) does not amount to a "prior restraint". "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur'." *Alexander v. United States*, 113 S. Ct. 2766, 2771 (1993) (citation omitted). Obviously, a decision by a cable operator to ban indecent programming amounts to neither an "administrative" nor "judicial order[]", and therefore would not qualify as a "prior restraint". *Third*, in all the cases relied upon by petitioners, the government was undertaking censorial powers.[29] In this case, a cable operator who chooses to ban or restrict indecent programming on its leased access channels is not engaging in an act of censorship, but is instead exercising its own First Amendment right of editorial discretion. Petitioners can point to no case where the alleged restraint itself was the exercise of free speech rights.

It is for this reason that, even if § 10(a) is found to constitute state action, this Court still should not find that it

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[29] *Compare Freedman v. Maryland*, 380 U.S. 51, 52 n.1 and n.2 (1965) (State Board of Censors granted statutory authority to "disapprove" films which were obscene or which "tend, in the judgment of the Board, to debase or corrupt morals or incite others to crimes" and making it unlawful to"sell, lease, lend, exhibit or use" any film not approved and licensed by the Board); *Southeastern Promotion, Ltd. v. Conrad*, 420 U.S. 546, 548 n.2, 554 (1975) (board confirmed by the city's board of commissioners and whose chairman was, by ordinance, the city's commissioner of public utilities, grounds and buildings, was empowered by municipal ordinance to grant or deny use of municipal theater based on its review of the content of the proposed production).

allows an impermissible prior restraint. When the government acts as a censor, the First Amendment rights of only one party, the party that seeks to present the censored speech, are at issue. The dispute is over whether the speech at issue is protected by the First Amendment. In that case, adequate protection of the speaker's rights is ensured by requiring procedural safeguards such as prompt judicial review where the government has the burden of showing that the censored speech is unprotected. *See Freedman*, 380 U.S. at 57-59.

Under § 10(a), however, the decision whether or not to present indecent speech is made by someone who is also a protected speaker. Therefore, the requirements set out in *Freedman* should be read less stringently. Under 47 U.S.C. § 532(d), a programmer has the right to bring suit in district court if it disagrees with an operator's decision not to provide it with leased access channel capacity. If the court finds that the programmer was improperly denied access, it may order the cable operator to provide it. *Id.*; *see also* First Report and Order ¶ 31 and n.28, App. 144a-145a. Thus, Congress has put in place a procedural framework balancing the interests of operator and programmer and protecting the programmer's statutory right to access.

In any event, § 10(a) cannot be a prior restraint on its face, at least where programmers receive advance notice of a cable operator's refusal to telecast indecent material, thereby permitting an order to show cause to be brought challenging that decision. In that case, the spirit of *Freedman* is satisfied.

The situation therefore simply is not analogous to one in which the government acts as a censor, and the Court should not require procedures which ignore the First Amendment right of the cable operator to use editorial discretion.

V. LEASED ACCESS CHANNELS ARE NOT PUBLIC FORA.

There is simply no justification for a finding that leased access channels constitute public fora. Indeed, petitioners argue only that public access channels constitute public fora and do not even attempt to apply this argument to leased access

channels.[30] Further, Judge Wald in dissent below did not rely on the public forum doctrine. *See* App. 53a-54a.

A cable system's channels plainly constitute the operator's private property. These systems were built at an enormous capital expense and with the expectation that cable operators would have the discretion to select the programming to provide subscribers on those channels. The 1984 Cable Act removed that discretion (unconstitutionally, we believe). That does not turn those channels into public fora.

Moreover, Congress has specified that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service". 47 U.S.C. § 541(c). There is no support, therefore, for the argument that cable operators are mere conduits of programming on leased access channels and that those channels are government property.[31]

As the majority below correctly noted, under the public forum doctrine "[s]tate action is present because the property is the *government's* and the *government* is doing the restricting". App. 28a (emphasis added). The argument that public forum principles can apply to private property dedicated to public use has been rejected by this Court. In *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), the Court, in holding that a shopping center may prohibit the distribution of handbills, emphasized that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes" and that "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use". *Id.* at 569. Similarly, in *Hudgens v. NLRB*, 424 U.S. 507 (1976), the Court held that striking workers had no right to picket in a shopping center, as that shopping center's private property was not converted into a

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[30] The arguments set forth herein that leased access channels are not public fora apply with equal force to public access channels.

[31] In *United States Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981), the Court rejected the notion that "simply because an instrumentality 'is used for the communication of ideas or information,' it thereby becomes a public forum". *Id.* at 130 n.6.

public forum merely by the public's use of it. *Id.* at 519-21, citing *Lloyd*, 407 U.S. at 567-70.[32]

Indeed, the government may assert complete control over private property without converting that property into a public forum. In *Greenburgh*, 453 U.S. at 123, 128, this Court found that a home mailbox, supplied and paid for by the homeowner, but controlled and regulated by the government, did not constitute a public forum. The passing reference in *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985), to "private property dedicated to public use" is merely dictum, and in view of this Court's other holdings does not support the use of such a doctrine. Nor is *Marsh v. Alabama*, 326 U.S. 501 (1946), applicable here. In that case, the "company town", although privately owned, had assumed "all of the attributes of a state-created municipality". *Lloyd*, 407 U.S. at 569, citing *Marsh*, 326 U.S. 501.[33]

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[32] The Court's decision in *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), is inapplicable here. The issue in that case was the interpretation of a state constitutional provision which specifically authorized more expansive free speech protection than the Federal Constitution. There the Court merely held that the state may require more expansive protection without violating the free speech rights of the owner of the property. Justice Powell, concurring, wrote that "I do not interpret our decision today as a blanket approval for state efforts to transform privately owned commercial property into public forums". *Id.* at 101.

[33] Petitioners claim that public access (not leased access) channels have been designated as public fora by the government in exchange for the use of easements on public rights of way. They also claim that sidewalks and streets are private property to support their argument that private property can and should be considered public fora. *See* Alliance Br. 34-35; New York City petitioners Br. 18-21. *First*, all media gain some form of public benefit (magazines receive reduced postage rates, newspapers use vending machines on government land) yet retain their private property status. The presence of newspaper vending machines on city streets does not turn newspapers into public fora. Moreover, no other private communications media has ever been turned into a public forum by government designation as a price for use of public property. *Second*, while the abutting landowner may be (but is not always) deemed by the municipality to own the fee in the public street, that fee is not voluntarily assumed, but imposed merely because of the geographical proximity of the

VI. IF SECTION 10(b) RENDERS SECTION 10(a) UNCONSTITUTIONAL, SECTION 10(b) SHOULD BE SEVERED.

If this Court concludes that the interplay between §§ 10(a) and 10(b) supplies the state action element rendering § 10(a) subject to strict scrutiny and a finding of unconstitutionality then § 10(b) can—and must—be severed to preserve the remainder.[34]

Courts have an obligation to interpret statutes so as to maintain their constitutionality. *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992) (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)). As a result, when faced with a constitutionally suspect provision of a statute:

> "[A] court should refrain from invalidating more of the statute than is necessary. . . . '[W]henever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid'". *Regan v. Time Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion; citation omitted).

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landowner. *See* 10A Eugene McQuillan, *Law of Municipal Corporations* § 30.32 at 281 (1990). In any event, the street is public before the landowner obtains the fee in it.

[34] While we do not discuss the constitutionality of § 10(b) herein, we vehemently disagree with petitioners' reliance on *Lamont v. Postmaster Gen.*, 381 U.S. 301, 305 (1965). *See* Alliance Br. 48 n.36; ACLU Br. 43-45. That case simply is not analogous to the matter at hand. *First*, every subscriber has to let the cable operator know what services they are ordering, whether it is Playboy, an adult pay-per-view movie, or the Disney Channel and a record is made of that selection (which must be kept confidential). A written request to receive all leased access programming is no different, and certainly informing a cable operator in 1995 that one wishes to receive such programming cannot validly be compared to an "official act" of informing the Federal Government in 1965 that one wishes to receive Communist propaganda that the government says "contains the seeds of treason". 381 U.S. at 307. *See also* App. 39a, n.23. Further, because any inhibitory effect is "highly speculative", *Buckley v. Valeo*, 424 U.S. 1, 69-70 (1976), there is no First Amendment violation.

The invalid portions of a statute are to be severed "'[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not'". *Buckley v. Valeo*, 424 U.S. 1, 108 (1976); *accord INS v. Chadha*, 462 U.S. 919, 931-32 (1983). Where, as here (47 U.S.C. § 608), a statute includes a severability provision, the presence of such a clause "gives rise to a presumption that Congress did not intend the validity of the Act as a whole, or of any part of the Act, to depend on whether [the suspect provision of the Act] was invalid". *Chadha*, 462 U.S. at 932; *see Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 686 (1987).

Even without this presumption in favor of severability, both the structure of the statute and its legislative history support a ruling of severability. *First*, Congress enacted § 10(a) as an amendment to § 612(h) and added § 10(b) as a new § 612(j). This indicates Congress' intent that the two provisions work separately. *Second*, § 10(a) does not rely on anything in § 10(b) for its operation. "A provision is further presumed severable if what remains after severance 'is fully operative as a law'". *Chadha*, 462 U.S. at 934. *Third*, Senator Helms clearly envisioned a legislative scheme which would make it possible for cable operators voluntarily to enact policies regarding indecent programming. Thus, Congress' intent was to "give[] cable operators the legal right to make [the] decision" about indecent programming on leased access channels. 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992). Taken together, these factors demonstrate that severability is not only a proper solution, but *the* proper solution.[35]

In this case, if this Court determines that the presence of § 10(b) renders § 10(a) unconstitutional, and § 10(b) is severed from the remainder of the statute, § 10(a) would be clearly constitutional. *See* App. 78a, 88a. Thus, because "[t]he court . . . has an obligation to save rather than destroy as much of the statute as is constitutional", App. 85a (Rogers, J.,

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[35] The same analysis (and conclusion) is warranted if this Court decides that the presence of § 10(d) renders § 10(a) unconstitutional.

concurring in part and dissenting in part (citing *Tilton v. Richardson*, 403 U.S. 672, 684 (1971))), this Court must sever § 10(b), to the extent it is found to be unconstitutional, and allow § 10(a), a constitutionally permissible provision, to stand.

If, however, this Court finds that § 10(b) is integral to § 10 and that § 10(a) cannot stand alone, then the entire leased access provision should fall. Should the Court strike down § 10 as unconstitutional, it must inquire "whether the statute [here, 47 U.S.C. § 532] will function in a manner consistent with the intent of Congress". *Alaska Airlines*, 480 U.S. at 685. It no longer advances the government's interest in programmer diversity to require unrestricted access to indecent programming when Congress itself has clearly indicated it does not intend for such programming to fall within the purview of government mandated access.

Clearly, if § 10(a) is removed from the leased access section, the remaining provisions would not be tailored to effect what Congress believed to be legitimate government interests. Indeed, if the statute were used to compel carriage of indecent programming, as plaintiffs contend, it would flatly contravene congressional intent. 47 U.S.C. § 532, therefore, must be struck down if the § 10 amendments are removed.

Conclusion

For the foregoing reasons, the decision of the Court of Appeals with respect to § 10(a) of the 1992 Cable Act should be affirmed.

January 29, 1996.

Respectfully submitted,

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Nos. 95-124 and 95-227

IN THE
Supreme Court of the United States
October Term, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents,

ALLIANCE FOR COMMUNITY MEDIA, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.,

Respondents.

On Writs of Certiorari to the U.S. Court of Appeals for the District of Columbia Circuit

MOTION OF THE FAMILY LIFE PROJECT OF THE AMERICAN CENTER FOR LAW AND JUSTICE FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

Pursuant to the Rules of this Court, the Family Life Project of the American Center for Law and Justice respectfully moves for leave to file the attached brief *amicus*

curiae in support of the Respondents in the above-captioned cases.

We are filing this motion because, despite our best efforts, we have not yet received written consents from all of the parties. No party has yet denied consent to our filing of a brief *amicus curiae*; however, we have not yet received responses from all of our requests.

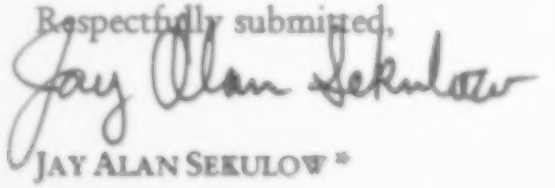
The American Center for Law and Justice ("ACLJ") is a national, nonprofit legal and education organization. Its purpose is to preserve, protect, and promote religious liberty through education, legal defense, legislative assistance, and related activities.

The Family Life Project of the American Center for Law and Justice ("Family Life Project") has been organized within the ACLJ to focus attention on the role of the family as the primary social and religious institution of a just society. The Project is dedicated to defending families against all efforts to undermine their sovereignty, nature and importance, and to supporting and encouraging all elements in society to work together toward the creation and sustenance of a social order that supports the important work of families: rearing children.

The present case involves the serious problem of pornography on cable television systems. The statute and regulations at issue here help to segregate indecent programming on cable television systems and, consequently, are valuable to families as a means of protecting children.

The proper resolution of this case is a matter of substantial organizational concern to the Family Rights Project of the American Center for Law and Justice because of its commitment to American families.

Respectfully submitted,



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January 25, 1996

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INTEREST OF THE AMICUS CURIAE

The interest of the Family Life Project of the American Center for Law and Justice is set forth in the motion attached to this brief.

SUMMARY OF ARGUMENT

Having been confronted by the indecency being purveyed as programming on certain leased access and public, educational and government access channels of cable systems, and recognizing its own significant role in making indecent programming available and unavoidable on cable television systems, Congress acted in 1992 to bring to an end its unfortunate experiment in hamstringing cable system operators who formerly enjoyed the right to prevent broadcasts of indecent programming on their systems. That Congress and the Federal Communications Commission were confronted with a real problem of profligate indecency, if not obscenity, is undeniable. That Congress acted to restore editorial control over the programming shown on leased access and public, educational and government access channels to cable system operators, as a means of curbing the flood of graphic depictions of sexual and excretory functions that resulted from the Cable Communications Policy Act of 1984, is also certain. *See* Argument I, *infra*.

The means chosen by Congress to remedy the problem were not excessive: there has been no ban imposed on indecent programming on leased access and public, educational and government access channels. Rather,

Congress and the Federal Communications Commission took stock of the important, compelling government interest at stake here: the protection of children from exposure to damaging materials. And, Congress and the Commission employed the least restrictive means to limit the accessibility of such materials to children, while leaving in place the opportunity to view indecent programming for those who wished to expose themselves to such materials. The actions complained of by the Petitioners were modest, perhaps too modest. The regulations of indecent programming on leased access channels certainly survive scrutiny of the sort employed by this Court in both *Sable Communications v. FCC*, 492 U.S. 115 (1989) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). *See* Argument II, *infra*.

ARGUMENT

I. INDECENT PROGRAMMING ON CABLE TELEVISION IS A SERIOUS PROBLEM THAT WARRANTED CONGRESSIONAL AND ADMINISTRATIVE ACTION.

Petitioners allege that their First Amendment right to freedom of speech is violated by the 1992 Cable Television Consumer Protection and Competition Act, Pub.L.No. 102-385, § 10, and by regulations promulgated thereunder by the Federal Communications Commission. *See* Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 58 Fed. Reg. 7990 *et seq.* (1993); Implementation of Section 10 of the Cable Consumer Protection and Competition Act of 1992, 58 Fed. Reg. 19,623.

In cases involving alleged infringements on expressive rights protected by the First Amendment Freedom of Speech Clause, U.S. CONST. amend. I, cl. 3, this Court has always begun its analysis by examining the conduct that is alleged to be communicative, in order to determine whether or not First Amendment protections are even at issue. *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 797 (1985) (setting out three-step analysis for claimed violations of freedom of speech). That step reflects this Court's concern for judicial economy and avoidance of unnecessary constitutional analysis. *Id.* When that initial step is taken here, the clear conclusion is that the programming affected by the indecency restrictions are, *at best*, indecent, and, in many cases, certainly pornographic.

There is no question that Congress was aware of the problem of pornographic programming on cable systems. For example, on certain "leased access" channels,[1]

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1. The Cable Communications Policy Act of 1984 obliged certain cable system operators (those with more than thirty-six channels) to set aside as much as fifteen percent of their channel capacity for commercial use by unaffiliated persons. *See* Title 47 U.S.C. § 532(b). Further, the 1984 Act prohibited system operators from editing the content of such commercially leased channels. *See* Title 47 § 532(c)(2). While stripping system operators of editorial control over these "leased access" channels, the 1984 Act gave local franchising bodies power to regulate -- and, indeed, to bar -- programming if it was "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy, or indecent or is

programming included depictions of "'men and women stripping completely nude' . . . performing oral sex . . . promoting 'incest, bestiality, [and] even rape . . . .'" *See Alliance for Community Media v. FCC*, 56 F.3d 105, 117 (D.C. Cir. 1995) (remarks of Senator Jesse Helms during Senate debate on Cable Television Consumer Protection and Competition Act's provisions regarding indecent programming). Further, Congress was aware that many of the leased access channels that cable system operators were compelled to set aside were, in fact, being used to display "'sex shows and X-rated previews of hard-core homosexual films,'" and "ads for phone lines letting listeners eavesdrop on acts of incest." *See Alliance for Community Media*, 56 F.3d at 117 (remarks of Senator Strom Thurmond during Senate debate on Cable Television Consumer Protection and Competition Act's provisions regarding indecent programming).

And Congress knew that the problem of pornographic programming was not limited to the "leased access" channels. Certain public, educational and governmental channels,[2]

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otherwise unprotected by the Constitution of the United States." *See* Title 47 U.S.C. § 532(h).

2. The 1984 Act also empowered franchising bodies to condition the grant or the renewal of a cable system franchise on the willingness of the operator to reserve "channel capacity" for "public, educational, or governmental use." *See* Title 47 U.S.C. § 531. Hereinafter, "public, educational, or governmental use" channels are referred to as PEG channels. The 1984 Act allowed cable system operators, together with franchising authorities, to specify that they

> were also being used, for example, 'to basically solicit prostitution through easily discernible shams such as escort services, [and] fantasy parties, where live participants, through two-way conversation through the telephone . . . [solicit] illegal activities.'

Alliance for Community Media, 56 F.3d at 117 (remarks of Senator Wyche Fowler during Senate debate on 1992 Act). Given its awareness of the content shown on many leased access and PEG channels, Congress quite properly concluded that public access "clearly . . . has . . . been abused . . . ." *Cf. Alliance for Community Media*, 56 F.3d at 117 (remarks of Senator Tim Wirth during Senate debate).

Lest Petitioners charge that such descriptions constitute legislative histrionics or overblown rhetorical flourish, the Federal Communications Commission was also presented with ample evidence of the pornographic abuses of both leased access channels and PEG channels. The Commission received evidence of leased access channels portraying "'in graphic detail intercourse, masturbation and other sex acts,'" and advertising "'sex-oriented products and services, such as 'escort services,' 'dial-a-porn' telephone lines and Screw Magazine . . . .'" *See Alliance for Community Media*, 56 F.3d at 117 (quoting public comments to the FCC on proposed regulations implementing 1992 Act).

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could refuse to provide cable services if they are "obscene or are otherwise unprotected by the Constitution." *See* Title 47 U.S.C. § 544(d)(1).

Further, as the Commission learned, local public access channels had been used to transmit, during the so-called "prime time" programming period, depictions of "'nude women . . . squatting and gyrating so their genitals were in full view,' and 'a tape of a totally naked man dancing and screaming obscenities.'" *Id.* And, although it was Congress, not the federal Executive, that probably bore responsibility for the dilemma that confronted cable system operators who found themselves powerless to edit out such smut, it was a photograph of the President of the United States on which a public access channel user urinated during a frontally nude depiction of that act. *Id.* at 118.

Given the information available to Congress and the Federal Communications Commission, it is plain that, at the heart of this dispute are communications that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Nothing in the First Amendment requires that Congress or the FCC stand by silently while our Nation's children are given ready access — as a direct consequence of a flawed federal experiment — to smutty and salacious depictions of human sexual and excretory functions.

II. THE 1992 ACT IS THE LEAST RESTRICTIVE MEANS OF SECURING THE COMPELLING GOVERNMENT INTEREST IN LIMITING CHILDREN'S ACCESS TO INDECENT PROGRAMMING.

One consequence of the Cable Communications Policy Act of 1984 was that cable systems were made to carry programming *and* barred from exercising editorial control over such programming, even though it might have been obscene, lewd, lascivious, filthy, or indecent. *See* Argument I, *supra*. Indecent programming and indecent programmers, as a consequence of legislative policy-making in the 1984 Act, had found quite a haven on cable systems around the Nation. Congress' decision to interfere with the editorial judgment of cable system operators represented a watershed, as the seedy and the unseemly became the available and unavoidable.

With the benefit of hindsight, the 1984 Act played a clear and unfortunate role in the propagation of indecent broadcasting on cable systems. That unfortunate consequence was brought to the attention of the Congress. *See Alliance for Community Media*, 56 F.3d at 117-18 (summarizing remarks of Senators Helms, Thurmond, and Fowler). Thus, as Congress is free to do under the Constitution, it made a decision to change the policies embodied in the 1984 Act as part of the overhaul of cable regulation embodied in the Cable Consumer Protection and Competition Act of 1992.

The title of Section 10 of the 1992 Act betokens its purpose: "Children's Protection from Indecent Programming on Leased Access Channels." *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 10. This Court has said that "[s]exual expression which is indecent but not obscene is protected by the First Amendment[,]" *Sable Communications v. FCC*, 492 U.S. 115, 126 (1989). This Court has never held, however, that indecent communications enjoy an absolute First Amendment privilege, or that governments are utterly powerless to respond to the problems associated with indecent programming. Rather, this Court has held

> [t]he Government may, however, regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest.

Sable, 492 U.S. at 126.

Further, the interest that prompted Congress to act, the protection of children, has been recognized by this Court as one which is compelling:

> [w]e have recognized that there is a compelling interest in protecting the physical and psychological well-being of minors. This interest extends to shielding minors from the influence of literature that is not obscene by adult standards.

Sable, 492 U.S. at 126.

Our Nation's duty to its children, to protect them from harm and to equip them for the future, has been recognized as a paramount obligation. With respect to the "dissemination of material which shows children engaged in sexual conduct, regardless of whether such material is obscene . . . ," this Court has stated, "[t]he prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York v. Ferber*, 458 U.S. 747, 753, 758 (1982). Of course, here the indecent programming has not *necessarily* been produced with the involvement of children. The threat to children from such programming lies, not in its making, but in the immediacy of access.

Technological advances in communications — cable television, direct satellite delivery of programming, telephone services, computer bulletin boards, and the Internet — have galloped ahead of governmental regulation. Unsurprisingly, all of these fast-paced and evolving technologies have been used by indecent programmers, and have made sexually explicit, *indecent* materials, readily available to children. Children who are not even looking for salacious portrayals of the bizarre and the crude were, nonetheless, able to gain instant access to indecent programming on leased access and PEG channels.

In response to this growing and serious problem, Congress might have considered enacting a complete prohibition on indecent programming on cable systems. Congress did not engage in the sort of sweeping prohibition of indecency that prompted this Court to strike the ban on

indecent telecommunications in *Sable*. Rather, Congress took two steps that, together, neither completely prohibited indecent programming on leased access and PEG channels nor made access to such programming too burdensome to withstand scrutiny here. First, Congress *untied* the hands of cable system operators (whose editorial control over leased access and PEG channels was eliminated in the 1984 Act). Second, Congress directed the FCC to oversee the implementation of steps to segregate indecent programming to channels that would remain available on request.

In *Sable*, of course, this Court struck down a total ban on indecent interstate commercial telephone communications, 492 U.S. at 126-31, while affirming a ban on obscene interstate commercial telephone communications, 492 U.S. at 124-26. The 1992 Act and the FCC's rulemaking here, although targeted at indecent communications, are quite different in character from the total ban on indecent telephone communications struck in *Sable*.

The indecent programming on leased access and PEG channels — identified by Congress, reported to the FCC, and summarized in the opinion of the court of appeals below — is a creature of Congress' making. It was Congress, in 1984, which forced cable system operators to set aside channels for leased access and simultaneously stripped those cable systems of the power to edit content, even though the content was indecent or pornographic. *See* Title 47 U.S.C. §§ 531, 532(b), 532(c)(2), 544(d)(1); *cf. Alliance for Community Media*, 56 F.3d at 110-11 (tracing the rise of leased access and PEG channels within cable systems). And, it was Congress that gave local

franchising authorities the power to compel cable system operators to make channels available for PEG use, as a condition for receiving or renewing a system franchise. *Id.*

Congress has only modestly approached the problems wreaked on the public by its 1984 experimentation. In essence, the 1992 Act restored to cable system operators editorial control over leased access channels. An examination of the pertinent sections of the 1992 Act shows that the Act is neither a sweeping ban nor more restrictive of indecent programming than necessary to serve the compelling government interest at stake.

Section 10(a) of the Act allows a cable operator to reject leased access programming if the cable system operator "believes [it] describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." Section 10(b) requires the FCC to make rules that would compel cable system operators who choose to continue carrying indecent programming on leased access channels to move all such programming to a separate channel, which could be blocked until the individual subscriber makes a written request for access. Section 10(c) empowers cable system operators to prohibit the use of PEG channels for the depiction of "obscene material, sexually explicit conduct, or material soliciting or promoting unlawful conduct." Finally, in section 10(d), Congress eliminated the statutory immunity from criminal and civil liability for obscene programming shown on access channels that cable system operators had previously enjoyed.

Congress did not ban all indecent programming on cable systems. Thus, appeals to the holding in *Sable* are unavailing. Rather than legislatively proscribing an entire class of protected *but regulable* speech, Congress simply discontinued an experiment that has been shown fraught with unintended and disastrous consequences. The direct consequence of Congress' action was the restoration to cable system operators of the power to prevent indecent broadcasting and the obligation to respect the compelling governmental interest in limiting access to such programming by children. This Court in *Sable* found the flat ban on indecent interstate telecommunications to be the constitutional equivalent of "burn[ing] the house to roast the pig," *Sable*, 492 U.S. at 127 (citation omitted). Congress considered the indecent programming forcibly promulgated through cable systems as a consequence of the 1984 Act to be the equivalent of giving the pig the house and moving the family into the pig's pen.

Congress did not violate Petitioners' rights by its enactment of the 1992 Act. The Federal Communications Commission did not violate the Petitioners' rights by its subsequent rule-making. This Court has upheld against constitutional challenge systems of regulation which do not ban indecent communications but restrict the time, place and manner of their communication so as to protect minors from exposure to them.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court upheld a declaratory judgment order of the Federal Communications Commission that the radio broadcast of a George Carlin monologue entitled, "Filthy Words," "'was

indecent and prohibited by 18 USC [§] 1464.'" 438 U.S. at 732 (citation omitted). What this Court had to say about "indecent" radio broadcasting, and regulatory restrictions thereof, could provide valuable guidance in the present case. Unlike *Sable*, *Pacifica Foundation* addresses the regulation of indecency, rather than its complete prohibition. In that respect, the reasoning in *Pacifica Foundation* is directed to analogous, if not identical, concerns.

Title 18 U.S.C. § 1464 prohibits the use of "any obscene, indecent, or profane language by means of radio communication." The Commission concluded that "the language used in the Carlin monologue [w]as 'patently offensive,' though not necessarily obscene . . . ." 438 U.S. at 731 (citation omitted). For the Commission, which was admittedly seeking to restrict the availability of such materials to children, the context of the broadcast of the monologue was key: it was "'broadcast at a time when children were undoubtedly in the audience . . . .'" 438 U.S. at 732 (citations omitted). After its order issued, the Commission clarified its order, stating it "'never intended to place an *absolute prohibition* on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it.'" 438 U.S. at 733 (citations omitted, emphasis added).

In *Pacifica*, this Court undertook the tasks of defining "indecent," 438 U.S. at 739-41, and weighing the constitutionality of the Commission's declaratory judgment that "Filthy Words" constituted a prohibited broadcast of "indecent" language. Before this Court, Pacifica Foundation,

the Respondent-Broadcaster of the "Filthy Words," argued that the Commission had misunderstood and misinterpreted the statutory ban on radio broadcasting of "obscene, indecent, or profane" language. 438 U.S. at 739-40. Essentially, Pacifica argued that the statutory term "indecent" had the same meaning as the term "obscene." *Id.* Consequently, in Pacifica's view, the absence of any prurient appeal in "Filthy Words" and the Commission's hesitance to declare the monologue obscene should have placed the monologue outside of the scope of the statutory ban on radio broadcasts of "obscene, indecent, or profane" language. *Id.*

This Court was not persuaded by Pacifica's arguments; rather the Court relied on the commonly accepted meaning and dictionary definition of "indecent." "[T]he normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality." 438 U.S. at 740. To give content to "indecent," this Court looked to the dictionary:

> Webster defines the term as "a: altogether unbecoming: contrary to what the nature of things or what circumstances would dictate as right or expected or appropriate: hardly suitable: UNSEEMLY . . . b: not conforming to generally accepted standards of morality; . . . .

438 U.S. 740 n.14 (quoting Webster's Third New International Dictionary (1966)).

Having arrived at its workable definition for "indecent,"

and having concluded that "the content of Pacifica's broadcast was 'vulgar,' 'offensive,' and 'shocking[,]'" 438 U.S. at 747, this Court proceeded to examine the context of the broadcast of "Filthy Words" "because content of that character is not entitled to absolute constitutional protection under all circumstances . . . ." *Id.*

This Court has "long recognized that each medium of expression presents special First Amendment problems[,]" 438 U.S. at 748 (citation omitted), and has noted that "it is broadcasting that has received the most limited First Amendment protection." *Id.* Two principal justifications were offered by this Court in *Pacifica Foundation* for the limitations on First Amendment protection afforded to the broadcast medium: its ubiquity, and its "unique[] accessib[ility] to children, even those to young to read." 438 U.S. 748-49. What this Court found to be true in *Pacifica Foundation* is no less true today.

With some irony, this Court noted that even though some quite offensive written message "might have been incomprehensible to a first grader, Pacifica's broadcast could have enlarged a child's vocabulary in an instant." 438 U.S. at 749. Irony can be an effective tool in forensics, but what Congress confronted as a result of the 1984 Act was much more than a sort of graphic "It Pays To Enrich Your Word Power." If the decision below, the debate in Congress on the passage of Section 10 of the 1992 Act, and the comments to the FCC's rulemaking have done nothing more, they have unveiled a truly horrific and shameful source of pollution of our Nation's social environment. *See* Argument I, *supra*.

The words of the "Filthy Words" monologue were patently offensive and the context of the broadcast, this Court found in *Pacifica Foundation*, fully justified the Commission's conclusion that the afternoon radio broadcast of the monologue violated federal law. In a similar vein, the pornographic, indecent programming that has come to plague leased access and PEG channels on cable systems around the country, fully justify Congress' decision to restore the status quo ante the 1984 Act. The 1992 Act "does not by any means reduce adults to [viewing] only what is fit for children . . . ." 438 U.S. at 750 n.28 (citing *Butler v. Michigan*, 352 U.S. 380 (1957)). Instead, the availability of indecent programming on cable systems, which from 1984 until 1992 had been subject to the discretion of programmers on leased access and PEG channels, will become a discretionary decision for cable system operators. *See* Cable Television Consumer Protection and Competition Act of 1992, § 10(a). Indecency will, unfortunately, continue to be available. But now indecent programming on cable systems will be segregated to insure minimal access by children. *See* Cable Television Consumer Protection and Competition Act of 1992, § 10(b).

Under the 1992 Act and the implementing regulations, indecency has not been proscribed. It has been segregated. The manner of segregation is the least restrictive one available to accomplish the important government purpose of protected children from exposure to those smutty programs that "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly

outweighed by the social interest in order and morality." *Chaplinsky*, 315 U.S. at 572. This Court should not permit appeals to the First Amendment to shield the purveyors of indecent programming from the reasonable regulations at issue in this case.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted,

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Nos. 95-124; 95-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, *et ano.*,

Petitioners,

vs.

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,

Respondents.

ALLIANCE FOR COMMUNITY MEDIA, *et al.*,

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vs.

FEDERAL COMMUNICATIONS COMMISSION, *et ano.*,

Respondents.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION, COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, FREEDOM TO READ FOUNDATION, INTERACTIVE DIGITAL SOFTWARE ASSOCIATION, INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, MAGAZINE PUBLISHERS OF AMERICA, INC., MOTION PICTURE ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF COLLEGE STORES, INC., NATIONAL ASSOCIATION OF RECORDING MERCHANDISERS, PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., PUBLISHERS MARKETING ASSOCIATION, RECORDING INDUSTRY ASSOCIATION OF AMERICA, INC., AND VIDEO SOFTWARE DEALERS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT

The American Booksellers Foundation for Free Expression, Council for Periodical Distributors Associations, Freedom to Read Foundation, Interactive Digital Software Association, International Periodical Distributors Association, Magazine Publishers of America, Inc., Motion Picture Association of America, National Association of College Stores, Inc., National Association of Recording Merchandisers, Periodical and Book Association of America, Inc., Publishers Marketing Association, Recording Industry Association of America, Inc., and Video Software Dealers Association submit this joint amicus brief urging reversal of the decision below.[1] This brief is submitted upon the written consents of counsel to both petitioners and respondents, which are submitted herewith.

INTEREST OF THE *AMICI*

Amici's members (hereinafter "*amici*") publish, produce, distribute and sell books, magazines, videos, sound recordings, motion pictures, interactive games and printed materials of all types, including those that are scholarly, literary, artistic, scientific and entertaining. Libraries and librarians represented by the Freedom to Read Foundation provide such materials to readers and viewers. *Amici*, mainstream providers of speech in a variety of forums and media, are concerned by the holding of the Court below. In a world with rapidly developing and integrating media technology, governmentally imposed standards of speech in one medium automatically impact every other medium. *Amici* submit this brief to highlight the very real danger of allowing the government to enact a legislative scheme targeting currently unpopular speech and to avoid constitutional scrutiny simply by cloaking the scheme in "permissive" language. When the government creates a detailed scheme to restrict

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[1] A description of the *amici* is attached as Appendix A.

disfavored but constitutionally-protected speech, it violates the rights not only of the restricted creators and distributors, but also of mainstream consumers who depend upon a wide variety of materials and who would rather discriminate in their consumption themselves than allow the government to dictate those choices.[2]

The regulatory scheme at issue in this proceeding could potentially be applied to ban or severely restrict access to a variety of educational programming, such as programs related to sex education, AIDS education or abortion, or programs devoted to reading from the great books, based on the content of those materials. The regulations compel a cable operator to ban or severely restrict the viewing of any program "that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. § 532(h)(2). Almost any description of a sexually oriented nature could, therefore, be banned or segregated under this definition. Programming that merely serves to educate the public on matters connected to sexuality might be banned, not because it is obscene, but because a cable operator is fearful that it might be offensive to some of its customers. For example, a cable operator might ban or segregate all programming that "describes" the availability of birth control or abortion to young people. In the end, the restrictions on speech imposed by the regulatory scheme will eliminate or chill important speech on matters of public concern.

In the past *amici* have brought numerous actions in both federal and state courts, to assert the unconstitutionality of invalid laws. *See, e.g., Virginia v. American Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986); *Video Software Dealers Ass'n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Village Books v. Bellingham*, C88-1470 (W.D. Wash. Feb. 9, 1989); *American Booksellers Ass'n, Inc. v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981); *Davis-Kidd Booksellers Inc. v. McWherter*, 866 S.W.2d 520 (Tenn. 1993); *Leech v. American Booksellers Ass'n, Inc.*, 582 S.W.2d 738 (Tenn. 1979).

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2 The Court has assiduously protected the "right to receive information and ideas." *See, e.g., Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976).

Amici believe that the definition of "state action" applied by the court below is incorrect and, if sustained, would permit legislatures to enact cleverly drafted statutes which could erode the scope of presently accepted First Amendment rights. Similarly, the assumption by the majority below that governmentally-imposed impediments to access to constitutionally-protected materials do not run afoul of the First Amendment as long as such materials are *eventually* available to persons desiring them also is incorrect and also endangers First Amendment rights.

The resolution of these issues will determine the scope of legislation affecting the First Amendment rights of *amici* in the future.

SUMMARY OF ARGUMENT

The majority of the District of Columbia Court of Appeals, sitting in banc, held that the challenged provisions of the Cable Television Consumer Protection and Competition Act, a federal statute, did not, for the most part, constitute "state action" and, to the extent that they did constitute state action, did not violate the First Amendment because the provisions were not an unconstitutional restriction on First Amendment rights. In reaching its decision, the Court of Appeals misapplied the relevant precedents of this Court and, in so doing, jeopardized the First Amendment rights of the *amici*.

By holding that the facially permissive nature of the challenged provisions removes them from the category of state action, the Court below avoided the task of analyzing whether the provisions represented a prohibited infringement of First Amendment rights. Such a cursory dismissal of constitutional scrutiny would allow a state or the federal government to pass legislation affecting almost any area of First Amendment rights but to avoid judicial review by structuring it to appear optional. The legislature must not be permitted to authorize or direct private action affecting First Amendment rights in such a manner, and thereby bring in through the back door what it is not permitted to bring in through the front.[3]

The federal statutes and regulations challenged in this Court obviously constitute state action since they are statutes and regulations passed by and enforced by the United States government. The inquiry does not end because petitioners passed the state action threshold. In this case, the actions that would be taken by the cable operators restricting access to constitutionally-protected materials under the challenged statute are subject to constitutional scrutiny since they are causally related to the challenged state action, having been authorized or directed by it. The statute targets and regulates a special category of speech; therefore, strict scrutiny must be applied. Finally, since content-based restrictions on, or impediments to, access to constitutionally protected materials cannot be validated

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[3] Indeed, passage of section 10 is a prime example of tailoring of statutory language to circumvent constitutional problems. (Senator Helms: "Under my amendment, cable operators have the right to reject such filthy programming .... [T]here is no constitutional problem with this amendment because this is not governmental action. It is an action taken by a private party." 138 Cong. Rec. S646 (daily ed. Jan. 30, 1992)

on the basis that the material will be ultimately available, the decision of the court below must be reversed.[4]

ARGUMENT

I. THE FEDERAL STATUTE AND REGULATIONS CHALLENGED IN THIS ACTION OBVIOUSLY CONSTITUTE STATE ACTION.

Since the First Amendment addresses only governmentally created restrictions, petitioners' success in this action depends upon a threshold determination that the above provisions constitute state action; only then need the Court subject those provisions to constitutional scrutiny. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 840 (1982).

Petitioners in this case challenge as violative of the First Amendment a governmental scheme under the Cable Television Consumer Protection and Competition Act ("Cable Television Act"), Pub.L. No. 102-385, 106 Stat. 1460, 1486 (to be codified at 47 U.S.C. §§ 531, 532(h), 532(j) and 558), and the regulations issued thereunder, 47 C.F.R. §§ 76.701, 76.702. The statutory and regulatory scheme as to leased access channels includes two elements of content-based restriction in an "either-or" scenario:

> 1. Elimination of all descriptions or depictions of sexually related material deemed patently offensive by the cable operator; or
>
> 2. Segregation of such material to one or more designated "indecent" channels after 30 days prior written request by the proposed viewer.

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[4] The *amici* are in agreement with the legal and policy arguments set forth by the Association of American Publishers in its amicus brief and write separately here to highlight additional legal and policy arguments of special concern to *amici*.

There is no alternative of non-action or free distribution of constitutionally-protected materials. A cable operator *must* either ban or block the material, despite the fact that it is by definition constitutionally-protected.

The section 10 provisions and accompanying FCC regulations are a blatant government attempt to chill, if not eliminate, a constitutionally-protected category of speech. The government dictates a set of options detrimental to a single category of protected speech, defines the contours of the targeted speech, requires certification of that speech by programmers and then regulates disputes arising from that certification process.[5] Moreover, the cable operator must carry such programs if they are not banned or segregated as patently offensive descriptions of sexuality. The government thus compels the cable operator to air such programs or ban them based on government-mandated restrictions. The airing of programs on cable is thus directly regulated and mandated by the government.

This case is a direct challenge of a Congressional statute and its implementing regulations themselves, rather than of actions taken by a private party and then attributed to the State.[6] Thus it stands in marked contrast to the precedents upon which this Court's state action doctrine has been built. In their attack on section 10 of the Cable Television Act, petitioners have not challenged a cable operator's decision to ban "indecent" programming under one of section 10's provisions; rather they have challenged the action of Congress in passing those provisions, and the actions of the FCC in implementing them. As Professor Tribe has aptly remarked, "[i]f litigants challenge

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[5] Pub. L. No. 102-385, § 10, 106 Stat. 1460, 1486 (codified at 47 U.S.C. §§ 531, 532(h), 532(j) and 558; 47 C.F.R. §§ 76.701, 76.702.

[6] *Amici* do not challenge, and in fact strongly support, the right of creators, distributors and retailers of First Amendment-protected materials to select what they create, distribute or sell, free of governmental restrictions.

a federal or state *statute* ... in a case where the validity of the statute is necessarily implicated, state action is obvious, and no formal inquiry into the matter is needed." Laurence H. Tribe, American Constitutional Law § 18-1 at 1688 (2d ed. 1988).[7] Cf. The First Amendment to the U.S. Constitution ("Congress shall *make no law* . . . .") (emphasis added).

The majority below missed this crucial distinction when it preliminarily queried whether the actions of cable operators under section 10 "may be attributed to the government."[8] The majority was thus able to rely, in support of its position, on an inapposite line of cases in which this Court denied governmental constitutional responsibility for decisions made by private actors. In *Blum v. Yaretsky*, for example,[9] a group of Medicaid patients who had been discharged or transferred from their nursing homes challenged decisions by the nursing homes to discharge or transfer them without notice or the opportunity for a hearing. They brought the action against state officials responsible for administering the State Medicaid programs, arguing state action on the grounds that the State had "affirmatively command[ed]" the summary discharge or transfer of Medicaid patients who were thought to be inappropriately placed in their nursing facilities.[10] In finding that there had been no state action, the Court focused on the fact that the nursing home patients had not challenged "particular state regulations or procedures,"[11] highlighting both that there was no direct challenge of regulations themselves and that the patients could

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[7] In the dissent below, Judge Wald also protested that "it strikes me as a wholly untenable proposition that a statute duly enacted by the Congress of the United States could be anything other than state action." *Alliance for Community Media v. F.C.C.*, 56 F.3d 105, 122, fn. 4 (D.C. Cir. 1995) (Wald, J., dissenting).

[8] 56 F.3d at 113.

[9] 457 U.S. 991 (1982).

[10] 457 U.S. at 1005.

point to no regulation which directed the basis of the doctors' decisions to transfer.

Similarly, in *Jackson v. Metropolitan Edison Co.*,[12] and in *Rendell-Baker v. Kohn*,[13] both cited by the majority in support of its finding that sections 10(a) and 10(c) do not constitute state action,[14] the parties bringing suit did not challenge State statutes or regulations, but rather private actions which were not related to any relevant regulations.

In *Jackson v. Metropolitan Edison Co.*, the Court found no state action when a customer brought suit against a privately owned utility company for terminating her electrical services. The Court there determined that the procedure for termination of electrical services was not a practice addressed by state regulation, but was merely approved by the state utility commission as part of its regulatory duties. 419 U.S. at 357.

In *Rendell-Baker v. Kohn*, the Court found no state action where a group of teachers sued the school for violation of their constitutional rights in connection with their discharges, reasoning that "the decisions to discharge the petitioners were not compelled or even influenced by any state regulation." 457 U.S. at 841. There again, the teachers did not challenge any specific state regulations, and, indeed, the Court noted that the state showed relatively little interest in regulating personnel decisions. *Ibid.*

In all of those cases, to the extent that the Court found no state action, it did so on the basis of avoiding "imposing on the

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11 457 U.S. at 1003.

12 419 U.S. 345 (1974).

13 457 U.S. 830 (1982).

14 Since the majority reached petitioners' First Amendment arguments regarding section 10(b), apparently they found state action in so far as that provision standing alone was concerned.

State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed."[15] There is no occasion for such an inquiry when, as here, Congressional action is at stake.[16]

II. IF THE LEGISLATIVE AND REGULATORY PROVISION AUTHORIZES OR DIRECTS THE STANDARD AND SUBSTANCE OF PRIVATE ACTIONS IMPACTING CONSTITUTIONALLY PROTECTED RIGHTS, IT IS NECESSARILY SUBJECT TO CONSTITUTIONAL SCRUTINY.

Having determined that, by challenging the statute and regulations themselves, petitioners have passed the state action threshold does not end the inquiry, however. In order to invoke constitutional scrutiny, the private party's actions which restrict constitutionally-protected materials must be authorized or directed by the challenged state action. Had the utility customer in *Jackson* challenged a statute regulating the utility, or had the teachers in *Rendell-Baker* challenged statutes regulating their school, even though the statutes would meet the test of constituting "state action," the parties were not able to point to specific

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15 *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

16 Even if the Court were to analyze the state action issue as though this action were a challenge to the actions of the cable operators themselves (which it is not), there would be ample ground for finding state action according to the above precedents. If a cable operator were to ban or block programming as a result of section 10, it would be basing its decision directly on a statute which targets a specific category of speech for special unfavorable treatment and for which the standard for that decision, the definition of indecency, is established by the state.

In *Blum*, the Court based its decision on the fact that the regulations at issue set no standard for its discharge or transfer decisions ("those decisions

(Footnote continued on next page.)

regulations having a causal relationship to the decisions to shut off the electricity or to discharge the teachers.[17]

Under this standard, even the relevant Medicaid provisions in *Blum* are not causally connected to the doctors' decisions to transfer or discharge patients. The provisions in question did require doctors to assess the medical needs of each Medicaid recipient and to place the patient in the appropriate facility, with a resulting adjustment of Medicaid reimbursement. However, as the Court argued in reaching its decision, the decisions of the doctors depended upon independent medical judgments "made by private parties according to professional standards that are not established by the State." 457 U.S. at 1008.

(Footnote continued from previous page.)

ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." *Blum*, 457 U.S. at 1008. In *Jackson* and *Rendell-Baker*, the Court argued that the government could not be implicated where there was no state regulation specifically addressing the actions taken by the private parties. *Jackson*, 419 U.S. at 357, *Rendell-Baker*, 457 U.S. at 841.

In passing section 10 of the Cable Television Act, the government, by providing for special and unfavorable treatment for programming that describes or depicts sexually oriented material and establishing the definition of such material, has implicated itself in that private action. Under this analysis, any private decision authorized by a statute which targets a specific category of speech for specific restrictive treatment should constitute state action and, as it is content-based, should be subjected to strict scrutiny.

17 The same reasoning explains the decision in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), where a black guest of a patron of a private club who was refused service sued for injunctive relief, citing state liquor board licensing provisions as the basis for his state action theory. Had the guest challenged the licensing provisions directly, he still would have failed the second test, as the plaintiff could not point to any provision having a causal relationship to the club's decision to deny him service.

In contrast, sections 10(a), 10(b) and 10(c) of the Cable Television Act define a specific procedure for a specific category of speech. The provisions mandate that indecent speech on leased access cable television be either banned or segregated and blocked, with access curtailed for up to 30 days, and authorize the banning of such speech, and only such speech, on public access cable television. The standard for judging whether the speech qualifies as indecent is established by statute and FCC regulations. The statutory scheme at issue here directly and substantively authorizes or directs the decisions of cable operators in determining their treatment of indecent speech.[18]

The majority opinion below suggests however that there is no First Amendment issue since 10(a) and 10(c) are not mandatory. This fails to see the forest for the trees. A hypothetical may be helpful. Let us assume that Congress passes a law containing a provision which authorizes bookstores to ban all books critical of the government, and the provision contains a definition of that category of books. If the bookstore owner chooses not to ban the books, another provision requires the bookstore owner to place them in a special room presided over by a guard to whom a special identification card must be presented upon entrance. It takes thirty days to obtain the card, and the statute provides that bookstores cannot release the names of the cardholders.

Such a statute would clearly be unconstitutional. However, if one adopts the majority's analysis, upon

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18 We have analyzed 10(a) and 10(b) together as a compulsory provision regarding indecent programming on leased access channels. The provisions' mandatory nature make it an easier case. However, the courts should subject *any* targeting of a specific category of speech for unfavorable treatment to strict scrutiny. While some permissive statutes may then pass constitutional scrutiny by the very fact that they are permissive and not compulsory in nature, the historical background of cable television regulation and the other parts of the present regulatory scheme dictate otherwise as to § 10(c).

constitutional challenge of the statute itself, the majority below would isolate the first provision, characterizing it as permissive in nature, would find no state action, and thereby avoid constitutional scrutiny. The majority would then argue that as long as a reader could ultimately buy the book and the seller ultimately sell it under the second provision, there is no infringement upon the First Amendment rights of either seller or buyer.[19] Under the majority's analysis, similarly "permissive" legislation allowing the banning of *any* constitutionally protected speech in any medium -- broadcasting, books, movies, the Internet -- could be passed with impunity and avoid analysis for constitutional infirmities.

The analysis which we believe appropriate and consonant with this Court's precedents would reach a contrary result. The challenge of the statute itself would satisfy the state action requirement for both provisions. Next, the legislation would be analyzed for its impact on the decisions of the bookstore owner. The provisions, taken together, would reveal a statutory scheme which requires a specific procedure (banning, or segregating and blocking) to be applied to a specific category of books (those critical of the government), with the government providing the standard definition for that categorization. The hypothetical legislation would be subjected to strict scrutiny; the challenged provisions of the Cable Television Act are similarly subject to strict scrutiny.

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19 See point III below.

III. CONTENT-BASED RESTRICTIONS ON, OR IMPEDIMENTS TO ACCESS TO, CONSTITUTIONALLY-PROTECTED MATERIALS CANNOT BE VALIDATED ON THE BASIS THAT THE MATERIAL WILL BE ULTIMATELY AVAILABLE.

Having met the two-pronged test described above, the challenged statute and regulations, which "suppress, disadvantage or impose differential burdens upon speech because of its content," must be subject to strict scrutiny. *Turner Broadcasting Sys., Inc. v. F.C.C.*, 114 S. Ct. 2445, 2459 (1994).

The application of strict scrutiny to the challenged statute and regulations involves numerous issues. One is of particular concern to *amici* and will be discussed here.

Under strict scrutiny, the government may regulate the content of constitutionally protected speech only if 1) the regulation promotes a compelling interest and 2) the government chooses the least restrictive means to further the articulated interest. *Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).

In order to satisfy the second prong, the Court must focus on the access of the receiver to the protected speech. The least restrictive means test is consistent with a long line of cases in which the Supreme Court has zealously defended the recipient's "right to receive information and ideas."[20]

Clearly, the banning of constitutionally-protected speech altogether under sections 10(a) and 10(c), if those provisions stood alone, would fail the least restrictive means test. The Court below was able to avoid that conclusion by finding no state action for those two provisions, but did engage in such analysis solely as regarded section 10(b).

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20 See fn. 2, *supra*.

However, both 10(a) and 10(b) address treatment of "indecent" programming on leased access channels and must therefore be viewed together. The statutory scheme challenged in this action includes two elements of content-based restriction in an "either-or" scenario:

> 1. Elimination of all descriptions or depictions of sexually related material deemed patently offensive by the cable operator; or
>
> 2. Segregation of such material to one or more designated "indecent" channels after 30 days prior written request by the proposed viewer.

The analysis of the majority in the Court of Appeals finds these alternatives constitutional only by ignoring a long-standing precedent of this Court which prohibits the imposition of impediments to speech with the rationale that the speech is available ultimately.[21]

The majority's position that section 10(b) provides the least restrictive means of regulating "indecent" programming is based upon a factual finding that the current voluntary blocking system is ineffectual. That finding, however, ignores the onerous nature of the challenged scheme's 30-day wait for the segregated programming. Requiring up to a 30 days wait to obtain any programming labelled as "indecent" creates a substantial impediment that cannot be characterized as "least restrictive." The numerous viewers who wish selectively to view the category of programming regulated by the scheme at issue here will normally not have more than a week or two of notice as to upcoming programming. The concept that a thirty-day wait following a required affirmative request by a reader, viewer or listener is constitutionally acceptable would, if applied to books, periodicals, videos and recording, preclude persons

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21 The clearest example of the majority's "ultimate access" approach is its approach to 10(b)'s 30-day waiting requirement.

from seeing many of the educational and cultural offerings associated with the *amici* which would fall under the government's broad "indecency" definition.

The majority stated that

> the difference between the two systems amounts to this: under the 1984 Act, their material does not get into the home if the subscriber locked it out; under the 1992 Act, their material does not get into the home unless the subscriber invites it in.

56 F.3d at 126. The majority then analogizes the blocking and segregation of the current statutory scheme with the blocking and segregation associated with pay-per-view programs. Thus, the majority states that "there is little difference between section 10's treatment of indecent leased access programming and the 1992 Act's handling pay-per-view programming." *Id.* The majority's opinion ignores a critical distinction between the current regulatory scheme and both the 1984 Act and pay-per-view programming: the 30-day waiting period for access to programming creates an unreasonable and serious impediment to access of programming. Pay-per-view programming may be accessed immediately with a single phone call. The lockbox feature of the 1984 Act permitted viewers to directly and immediately control their programming availability. By contrast, the current regulatory scheme imposes severe constraints on the availability of constitutionally-protected programming. The Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Where alternatives such as lockboxes are available, it is apparent that a scheme that requires an advance 30-day request for programming is not the least restrictive alternative.

The majority's offhand minimization of the 30-day waiting period ignores the Court's prior rejection, in cases

involving zoning restrictions and delays in the receipt of mail, of the same argument that the restriction or delay is permissible since persons ultimately have access to the protected speech.[22] In general terms, the majority is arguing that ultimate access to "indecent" programming is sufficient and does not impose a meaningful restriction. As this Court found in *Lamont v. Postmaster General of United States*, 381 U.S. 301 (1965), "the 'uninhibited, robust and wide-open' debate and discussion that are contemplated by the First Amendment" is inconsistent with a requirement that unpopular speech can be delayed and subject to a requirement that the prospective recipient must affirmatively request it. (381 U.S. at 307)[23]

The unconstitutional inhibitions on First Amendment rights caused by such a provision are not caused solely by the fact that such a requirement is addressed to a content-specific class of speech tainted by being so designated by the government. *Amici* know well from their own businesses the importance of browsing and impulse purchasing of core First Amendment items such as books, magazines, recordings, videos and motion pictures.[24] Further, *amici* also know that state and local governments, frustrated in their efforts to prohibit the distribution of unpopular constitutionally-protected materials, may seek to reach the same goal by imposing one or more impediments

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22 *See, e.g., Schneider v. State*, 308 U.S. 147 (1939); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Lamont v. Postmaster General of United States*, 381 U.S. 301 (1965).

23 This would not be validated as a time, place and manner restriction since, as such, it would have to be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

24 *See, e.g., American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546, 1549 (N.D. Va. 1986); *American Booksellers Ass'n v. Strobel*, 617 F. Supp. 699, 702 (D.C. Va. 1985).

between the provider and the consumer of First Amendment protected materials. The Court should guard against such attempts.

CONCLUSION

One of the glories of the First Amendment is that it permits a broad and diverse distribution of expressive material, whether popular or not. The broad range of media, the multiplicity of distribution outlets--large and small, expensive or not, local or national--and the diversity of the forms which the expression take create this panoply. The application of the principles of what is state action and what level of regulation of First Amendment material is permissible as decided by this Court in this case will not be limited to the newer technologies and media that are before the Court in this case. They will apply to the more traditional forms and media of expression as well.

Amici urge the Court to reaffirm its precedents and reverse the decision of the court below, finding that the federal statute and regulations at issue in this case constitute state action, and that the scheme created by the statute and regulations violates the First Amendment to the U.S. Constitution.

Respectfully submitted,

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APPENDIX A: THE *AMICI*

The American Booksellers Foundation for Free Expression (ABFFE) was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry, and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading materials.

The Council for Periodical Distributors Associations is the national trade association for approximately 330 independent local wholesale distributors who distribute over 90% of all magazines in every state of the United States, as well as comic books, paperback books and newspapers.

The Freedom To Read Foundation (FTR) is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, to foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, to support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and to establish legal precedent for the freedom to read of all citizens.

The Interactive Digital Software Association is a trade association whose members represent the leading publishers of interactive entertainment software.

The International Periodical Distributors Association (IPDA) is the trade association for the principal national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Magazine Publishers of America (MPA) is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer

magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The Motion Picture Association of America is a not-for-profit corporation founded in 1922 for the purpose of promoting the interest of the motion picture industry in the United States and helping the industry maintain high standards and public goodwill.

The National Association of College Stores, Inc. is a trade association comprised of approximately 3,000 college stores located throughout the United States.

The National Association of Recording Merchandisers is an international trade association whose more than 1,000 members represent recorded entertainment retailing, wholesaling, distributing and manufacturing.

The Periodical and Book Association of America, Inc. is an association of magazine and paperback book publishers who rely on newsstand sales and who distribute magazines and books through independent national distributors, wholesalers and retailers throughout the United States and Canada.

The Publishers Marketing Association ("PMA") is a nonprofit trade association representing more than 2,000 publishers across the United States and Canada. The PMA represents predominantly nonfiction publishers and assists members in their marketing efforts to the trade.

The Recording Industry Association of America, Inc. ("RIAA") is a trade association whose member companies produce, manufacture and distribute over 90% of the sound recordings sold in the United States. The RIAA is committed to protecting the free expression rights of its member companies.

The Video Software Dealers Association (VSDA) is the trade association for the home video entertainment industry. It represents more than 3,500 member-companies in North America

and 22 countries worldwide, including small, independently owned video retailers as well as large video chains. It also includes the home video divisions of all the major and independent motion picture studios, and the other associated businesses that comprise the home video industry.

No. 95-227
(Consolidated with No. 95-124)

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

ALLIANCE FOR COMMUNITY MEDIA,
ALLIANCE FOR COMMUNICATIONS DEMOCRACY,
AND PEOPLE FOR THE AMERICAN WAY, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION AND
UNITED STATES OF AMERICA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL FAMILY LEGAL FOUNDATION IN SUPPORT OF THE UNITED STATES

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January 29, 1996

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CONSENT OF THE PARTIES

Attorneys for Petitioners and Respondents have consented to the filing of an amicus curiae brief by National Family Legal Foundation. (See Appendix B).

INTEREST OF AMICUS CURIAE

National Family Legal Foundation ("NFLF") is a nonprofit, public interest corporation that seeks to preserve the integrity of families and the innocence of children by promoting a healthy and safe environment, free from pornography and the sexual crimes which invariably accompany its widespread availability. NFLF provides legal assistance to individuals, organizations, prosecutors and other public officials concerned about the harmful impact of pornography on the quality of life.

NFLF founder Alan E. Sears was the Executive Director of the Attorney General's Commission on

Pornography. In its 1986 Final Report, the Commission discussed the harms caused by the proliferation of sexual images in our society, and warned against the dangers of exposing children and unconsenting adults to pornography. Mr. Sears and NFLF have been active in urging the Federal Communications Commission to enforce its prohibition of indecent broadcasts, and in urging Congress and the Federal Communications Commission to allow cable companies to prohibit indecency. Former Attorney General Edwin Meese III, who presented the 1986 Commission Report, continues to support enforcing constitutional laws restricting various forms of pornography by serving as an active member of the Board of Directors for National Family Legal Foundation.

SUMMARY OF THE ARGUMENT

This case is indeed about pornography, and more particularly, whether families are required to expose their children to pornographic, indecent speech in order to have access to the latest news, educational programming and entertainment provided by cable television. We know that when cable companies were not given the ability to prevent indecent speech, pornography flourished on leased access and public access television.

As an organization devoted to fighting on behalf of neighborhoods seeking protection from sex businesses, and on behalf of families seeking protection from the devastating influence of pornography on families and children, we believe parents should not have to choose between the benefits of cable and the dangers of easily accessible cable pornography. They should be able to have the advantages of cable TV without fear that their children

will be exposed to pornographic material they would never subscribe to or purchase.

While the government regulation in this case, which allows cable operators to exercise editorial discretion, is not "state action," even if it were, the First Amendment would not be violated by this reasonable restriction on just a portion of the cable television options available to homes. Indecency reaches most people virtually every day from any number of forums, including pay-per-view and premium channels on cable TV. It need not also be given license to pollute leased access and public access channels that are a part of most cable companies' basic package.

ARGUMENT

I. Petitioners' contention notwithstanding, this case is about pornography being pushed on children and unconsenting adults.

"Petitioners cannot overemphasize that, despite Congress's rhetoric in enacting Section 10, this case is not about obscenity or pornography." (Petitioners' brief at 3). Yet Congress seemed to think otherwise, and every major anti-pornography group is concerned enough about the consequences of this Court's decision to file briefs in this case.

The uncontroverted evidence, which was known to and cited by Congress, is that leased access and public access television have for many years been exploited by sexual deviants, from professionals like Al Goldstein to amateurs like Bob Baxter. (See Exhibit A). All of these exploitive cablecasts are pornographic, most are indecent according to the definition this Court provided in *FCC v.*

Pacifica, 438 U.S. 726 (1978), and many border on obscenity. And all are available to any child who can operate a remote control, or to any unconsenting adult who is channel surfing.

The abuses of leased access and public access channels by pornographers were well documented in Congress and before the Federal Communications Commission. Time-Warner testified that Midnight Blue presented videos with graphic scenes of intercourse, masturbation and other sex acts. Public access channels were used to show female nude dancers gyrating with their genitals in full view. On another public access channel a man exposed himself to the camera and urinated on a picture of the President of the United States. (If that had happened outside the studio, he would have been arrested for public indecency; inside the studio, he can safely expose himself to the camera and end up with Petitioners and other activist groups arguing to protect his "freedoms" in the U.S.

Supreme Court!)

No child or unconsenting adult should have to come across such pornography, profanity and vulgarity on their own television. But they will if cable companies are deprived of the right to make editorial judgments for their companies regarding the appropriateness of certain programs.

II. This case is not about "censorship," because by its very terms the statutory language at issue merely frees up local companies to exercise their own editorial discretion regarding "indecent" cablecasts, and therefore does not constitute "state action".

What this case is truly not about is "censorship," a word that finds its way into Petitioners' brief with alarming frequency. Censorship in violation of the First Amendment is by definition an action only the government can take. All the government did in this case was remove an obstacle to the freedom of cable companies to keep indecent programming from assaulting unsuspecting subscribers.

And the obstacle the statute removed was one of Congress's own creation. See Cable Communications Policy Act of 1984, 47 U.S.C. §§ 531 (e), 532 (c)(2), Stat. App. 1a, 4a.

The relevant language from Section 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, which applies to leased access, states that "[t]his subsection shall permit a cable operator to enforce prospectively a written and published policy of prohibiting programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards." 47 U.S.C. § 532(h). Section 10(c) applies to public access channels, and requires the FCC to promulgate regulations prohibiting programming that contains "sexually explicit conduct" or "material soliciting or promoting unlawful conduct." 47 U.S.C. § 531.

This is not brain surgery. A lengthy analysis of

legislative history is unnecessary, and largely irrelevant. The law speaks for itself. It says that the FCC needs to come up with regulations that permit cable operators to create a policy for prohibiting indecent programs. It is not a law that requires cable operators to create and enforce such a policy. Because there is no "coercion" or "significant encouragement" from the federal government, there is no "state action": "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982). Allowing cable companies to exercise editorial discretion is not "state action."

III. Even if this Court finds "state action," the statute is constitutional because applying the well-defined "indecency" standard to a portion of the cable available to homes is a permissible attempt to regulate the time, place and manner of indecent speech in

order to protect children and unconsenting adults in the sanctity of their home.

Even if this Court concludes that the exercise of editorial discretion by cable companies is "state action," we reject the government's "concession" that the First Amendment is violated. An unnecessary concession by the government might affect its enforcement decisions, but should not affect this Court's constitutional interpretation.

The indecency standard is not vague or unascertainable. It is nuisance speech which, although entitled to some First Amendment protection, is also subject to reasonable time, place and manner regulation to prevent it from assaulting children and unconsenting adults, particularly in the privacy of their own home. Anyone who subscribes to cable has numerous opportunities to purchase indecent speech, and perhaps even obscenity, through premium channels and pay-per-view. But leased access and public access channels are nearly always free with a basic

service subscription. If Petitioners' succeed in this challenge, a customer who desired to protect the sanctity of his home from indecent speech would have to cancel cable, surrendering his right to receive any cable channels at all, in order to protect his children from exposure to indecency. Surely our Constitution does not require families to sacrifice access to the latest news, education and entertainment on the altar of "patently offensive descriptions or representations of sexual or excretory functions."

This Court has consistently held that there are classes of "speech" which are outside the protection of the First Amendment. For example, obscenity is not protected by the First Amendment. *Miller v. California*, 413 U.S. 15 (1973); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words" unprotected)[1]; *Hess v. Indiana*, 414 U.S.

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[1] In *Rosenfeld v. New Jersey*, 408 U.S. 901, 905-06 (1972), three dissenting justices expressly noted that *Chaplinsky*'s First Amendment exceptions encompassed nuisance speech.

105 (1973) (speech advocating imminent violence unprotected). This case implicates yet another class of speech which does not enjoy constitutional protection -- nuisance speech.

Nuisance speech is speech which, in view of the time, place or manner of its delivery, unduly and unreasonably interferes with the privacy of the home. *See Kovacs v. Cooper*, 336 U.S. 77 (1949); *Hess*, 414 U.S. at 107-108; *Mesarosh v. State*, 459 N.E. 2d 426, 427-28 (Ind. Ct. App. 1984); see also Chafee, Free Speech in the United States, (1941) at 148-150.

In *FCC v. Pacifica*, 438 U.S. 726 (1978), this Court recognized that indecent speech constitutes a nuisance and is subject to stringent regulation in the context of the broadcast medium. In *Pacifica*, the Supreme Court held that a monologue entitled "filthy words" was indecent as broadcast and therefore violative of 18 U.S.C. §1464. *Id.* In concluding that a broadcast of "patently offensive words

dealing with sex and excretion" could be regulated "because of its content", the *Pacifica* Court noted that: "[Indecent speech] offend[s] for the same reason obscenity offends. . . . [S]uch utterances are no essential part of any exposition of ideas and are of . . . slight social value." 438 U.S. at 746.

This Court has permitted the government to protect the privacy of the home from intrusive and offensive speech in other contexts as well. In *Breard v. Alexandria*, 341 U.S. 622 (1951), this Court sustained an ordinance aimed at methods of communication which intrude uninvited into the privacy of the home. In the same vein, this Court in *Kovacs* observed "that more people may be . . . reached by sound trucks . . . is not enough to call forth constitutional protection for what is . . . a nuisance." 336 U.S. at 88-89; *see Tallman v. United States*, 465 F.2d 282, 285-86 (7th Cir. 1972).

In *Hess*, this Court explicitly recognized that

"nuisance speech" is unprotected by the First Amendment, concluding that the speech at issue in that case was protected, in part, because it did not "amount to a public nuisance in that privacy rights were not being invaded." 414 U.S. at 107-108. Finally, in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), Justice Stevens noted in dissent that "[v]ulgar language, like vulgar animals, may be acceptable in some contexts, and intolerable in others. . .. It seems fairly obvious that Respondent's speech would be inappropriate in certain . . . settings." *Id.* at 696. The majority in *Bethel* held that a student could be penalized, consistently with the Constitution, for making indecent remarks in a speech before a school assembly. 478 U.S at 696.

IV. Cablecast indecency may be extensively regulated because it is unprotected nuisance speech.

The evils Congress sought to prevent, and the governmental interests which justify regulating broadcast

indecency, apply with undiminished force to the regulation of cablecast indecency. This Court in *Pacifica* noted with approval the two main concerns motivating the FCC -- the intrusive nature of broadcasting (where programming comes directly into the home creating the danger that the sensibilities of unwilling recipients would be offended) and the risk of exposing children to indecency. *Pacifica*, 438 U.S. at 748-49. The same concerns justify the regulation of indecent cablecasts. The television which supplies broadcast indecency also supplies cablecast indecency. *Pacifica* teaches that there is no constitutionally significant difference as to whether the "pig comes into the parlor" via the public airways, or along a coaxial cable. *Id.* at 750.

Moreover, no greater scope of choice inheres in the decision to receive cable television signals in the home. The person who purchases a television "elects" to receive broadcasts. *Pacifica* clearly stands for the proposition that it does not follow that he wants indecent material broadcast

into his home. 438 U.S. at 749. Similarly, the purchaser of basic cable services "elects" to receive cable television programs. Under the logic of *Pacifica*, it does not follow that he also desires to have indecent materials cable cast into his home. Indeed, if citizens are entitled to be in a public place without having to turn their eyes to avoid sexually explicit nudity, they must, a fortiori, be entitled to be in the privacy of their homes without having to "flip the dial" to avoid being bombarded with indecent images. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 564 (1991).

In short, Congress can prohibit cablecast indecency because it constitutes a nuisance and nuisance speech is not protected by the First Amendment. Congress can, of course, regulate the presentation of cablecast indecency rather than prohibit it outright, as it did with Section 10 of the 1992 Cable Act. Section 10 is therefore an appropriate and lawful exercise of legislative power.

CONCLUSION

American society has suffered from a tremendous decline in civility over the past few decades. Common courtesy and decency seem to be relics of a previous generation. This decline can be seen in everything from minor traffic altercations that end with gunfire to profane bumper stickers, from stadiums full of sports fans shouting vulgar slogans in unison to the coarseness of our entertainment culture.

Constitutionally protected "indecent" speech -- speech that has never been the highest priority for our nation or this Court -- speech that reaches depths of offensiveness that few seek to descend to -- is everywhere available. You hear it on the streets, at the ballgames, on videotapes and record albums, in our films, through the telephone, and yes, on cable television through pay per view and premium channels. Isn't that enough? Can't families

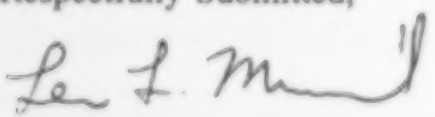
with young children, in the privacy of their own home, seek out the entertainment afforded by basic cable television without risking exposure to hard-core sex acts and nude dancing? Can they leave their teenagers home alone with the television? Or must this one area of entertainment, one small part of one large medium, also be soiled by indecency? Is our freedom really so fragile that it is unconstitutionally damaged by allowing cable companies to say no to frontal scenes of male urination?

Must they be asked to turn the dial after exposure, which as this Court pointed out in Pacifica is like suggesting the remedy for assault is to run away after the first blow? Or worse, must they abandon the news, education and entertainment offered by cable television by canceling any service at all?

On behalf of decent families and children throughout America, we urge this Court to uphold the constitutionality of Section 10 of the 1992 Cable Act, and free cable

companies to clean up their public and leased access channels without interference from the government.

Respectfully Submitted,



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APPENDIX A

Dimension Cabie Company (now Cox Communications) aired the broadcast recorded on this video labeled as Exhibit "A", in Phoenix, Arizona on public access channel 22 at 11:00 p.m. on Saturday, July 30, 1994. Exhibit "A" was videotaped in a private home after its discovery while channel surfing, so the tape begins mid-way into the presentation:

The scene opens with an interview conducted by a male who identifies himself as Bob Baxter. He is interviewing a nude female, identified as Ms. Nude Texas, who is standing with her arms down at her side. Both of her breasts and her front pubic hair are fully exposed during an approximate two-and-one-half minute interview.

Scene moves outside by swimming pool, where Bob Baxter introduces the physical exhibition segment of the competiton by Ms. Nude Texas. She places herself on a zebra print blanket by the pool and begins to stretch and pose. She spreads her legs, stretches back to lift her breasts upward, raises her body up with both arms and legs down, lifting her head up and pushing her buttocks up with genital area exposed. She stands up and leans over frontwards, with a camera shot close-up of her buttocks and anus.

Bob Baxter interviews the next contestant, "Molly," Ms. Nude Washington, who reveals her fully nude breasts. The scene changes to the inside set where another interview is conducted with the blond female identified as "Molly" standing with her bare breasts in full view. Back outside, Molly reveals full frontal nudity and is shown in successive scenes fondling her own breasts, and making various sexually explicit movements while laying face up totally nude on a raft in the pool. Molly ends her exhibition by bowing with her back to the camera, facing a group of males, with her bare buttocks filling the screen.

Three females are standing together outside playfully doing a "can-can" type dance. In this scene there is full frontal nudity. The girls move around to the music and close by turning their backs to the camera and bowing together, with their bare buttocks fully exposed. The camera zooms in on the exposed anus of the female in the center of the group.

The winners of the Ms. Nude America contest are announced. The winner is identified as contestant Lorraine, Ms. Nude New York. She participates in an interview with Bob Baxter and full frontal nudity is on camera for several minutes.

The broadcast concludes with camera shots around the swimming pool with various unidentified nude males and females talking, walking, and sunning themselves.

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January 16, 1996

Len L. Munsil, Esq.
Executive Director and General Counsel
National Family Legal Foundation
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Scottsdale, Arizona 85254

Re: Alliance for Community Media v. FCC, No. 95-227 (S. Ct.)

Dear Mr. Munsil:

On behalf of the Alliance for Community Media, the Alliance for Communications Democracy, and People For the American Way, I hereby consent to the National Family Legal Foundation filing an amicus curiae brief in the above-captioned case.

Please note that this consent applies to the above three organizations only. You will need to obtain the consent of the other parties from their respective counsel.

Please call me if you have any questions.

Very truly yours,

Michael K. Isenman

cc: James A. Feldman, Esq.

U. S. Department of Justice

Office of the Solicitor General

Washington, D.C. 20530

January 16, 1996

Len L. Munsil, Esq.
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11000 North Scottsdale Road
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Re: The Alliance For Community Media, et al. v. FCC, No. 95-227

Dear Mr. Munsil:

As requested in your letter of January 3, 1996, I hereby consent to the filing of an amicus curiae brief on behalf of the National Family Legal Foundation in the above-captioned case.

Sincerely,

Drew S. Days, III

Drew S. Days, III
Solicitor General

cc: William K. Suter, Esq.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Denver Area Educational Telecomm
from Cable

I hereby consent to the filing of an Amicus Curiae Brief in [redacted] v. FCC, #95-124 (consolidated with #95-227), by the National Family Legal Foundation.

1-25-96
Date

Charles S. Sims

I, Robert T. Perry, do hereby consent to the filing of an Amicus Curiae Brief in *Alliance v. FCC*, No. 95-227, consolidated with 95-124, by the National Family Legal Foundation.

1/24/96
Date

Robert T. Perry
Robert T. Perry

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing "Brief of Amicus Curiae National Family Legal Foundation In Support of the United States" have been sent by U.S. Mail, Postage Prepaid, on this 29th day of January, 1996, to:

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Nos. 95-124 and 95-227

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC., ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL., RESPONDENTS

ALLIANCE FOR COMMUNITY MEDIA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL,. RESPONDENTS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTRODUCTION

The Attorney General of the State of New York (hereinafter "New York") submits this brief in support of Respondent FCC's position that the FCC orders governing indecent programming which implement the Cable Television Consumer Protection and

Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, are constitutional. Specifically, New York supports the FCC's position that Section 10b of the 1992 Act requiring "segregation and blocking" is a valid exercise of the government's power to protect the well-being of minors and thus meets the "compelling interest" test.

INTEREST OF NEW YORK

New York has a long tradition of protecting the well-being of minors. Consistent with that tradition, New York has a clear interest in the segregation and blocking requirements imposed by the 1992 Act and implementing regulations.[1]

SUMMARY OF ARGUMENT

A line of United States Supreme Court decisions underscores the government's compelling interest in protecting minors. This interest is particularly relevant for material broadcast on cable television, which reaches a broad audience including children. In New York State the legislature and courts have recognized this compelling interest and taken steps to protect children from indecent and obscene material.

[1]The New York State Senate approved Resolution No. 2141 on January 9, 1996 to recognize the concern of the people of the State of New York regarding obscene and indecent television programming carried on leased access cable television channels, and to "support and endorse the concepts for control of indecent and obscene programming on leased access cable channels embodied in the 1992 Federal Communications Act."

ARGUMENT

THE SEGREGATION AND BLOCKING REQUIREMENTS ARE PERMISSIBLE BECAUSE THE GOVERNMENT HAS A COMPELLING INTEREST IN PROTECTING THE PHYSICAL AND PSYCHOLOGICAL WELL-BEING OF MINORS

In a line of decisions that includes *Ginsberg v. New York*, 390 U.S. 629 (1968) and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), this Court has reiterated and underscored the government's compelling interest in protecting "the physical and psychological well-being of minors." *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989).[2]

This interest has been articulated in many fashions and with respect to many mediums, but is particularly relevant for material broadcast on radio and television. In *FCC v. Pacifica Foundation, supra,* the Court noted that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," 438 U.S. at 748, and concluded:

> "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." *Ibid.*

[2]This *amicus* brief neither addresses the "state action" issue nor in any way condones preemption of state regulation of cable access channels. This brief also does not address whether segregation and blocking are the least restrictive means to protect minors.

The court below noted that "[n]early fifty-six million households, more than sixty percent of all households with televisions, subscribe to cable service." *Alliance for Community Media v. FCC*, 56 F. 3d 105, 124 (D.C. Cir. 1995). Data maintained by the Public Service Commission, the state agency responsible for regulating the cable television industry, indicate that in New York State approximately 1.5 million households with cable service contain minors under 18 years of age. This is a substantial audience which justifies significant legislative and judicial attention.

There is no doubt that cable programming includes readily accessible indecent material. The legislative history set forth in the congressional record accompanying the 1992 Act is replete with examples of viewers' concerns, including correspondence from New York. 138 *Cong Rec.* S646-49 (daily ed. Jan. 30, 1992).

In *Ginsberg v. New York, supra*, this Court held that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society" and that "[p]arents...who have this primary responsibility for children's well-being are entitled to the support of laws designed to aid discharge of that responsibility." 390 U.S. at 639. Recognizing the compelling government interest, articulated by this Court, New York State has adopted statutory provisions to protect children from exposure to indecent and obscene material.

For instance, Penal Law §235.21 makes it a class E felony to disseminate indecent material to minors in New York State. In *Bookcase, Inc. v. Broderick*, 218 N.E. 2d 668 (1966), the New York Court of Appeals upheld the constitutionality of an earlier version

(Penal Law 1909 §484-h) of that statute. *See also People v. Kahan*, 206 N.E. 2d 333 (1965); *Ginsberg v. New York, supra*, 390 U.S. at 638-40. In reaching its decision, the Court of Appeals gave great weight to the legislative finding that such literature is "a contributing factor to juvenile crime, a basic factor in impairing the ethical and moral development of our youth and a clear and present danger to the people of the state." *Bookcase, Inc. v. Broderick, supra*, 218 N.E. 2d at 673. We respectfully submit that the legislative interest in regulating indecent cable programming, which is carried directly into subscribers' homes, is at least as compelling as the government interest in regulating indecent literature which is available for purchase outside the home.

CONCLUSION

The opinion of the Court of Appeals for the District of Columbia Circuit properly applies the compelling interest test to protect the well-being of children and in this respect should be upheld.

Dated: January 29, 1996
New York, New York

Respectfully submitted,

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